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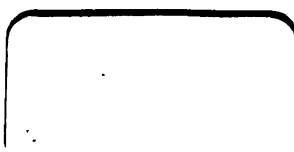
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INDEX.

ARTICLES.

	PAGE
BETTER EDUCATION THE GREAT NEED OF THE PROFESSION. <i>Hon. D. J. Brewer</i>	I
CONSEQUENCES OF CUBAN BELLIGERENCY. <i>Theodore S. Woolsey</i>	182
DETERMINING THE VALIDITY OF A PATENT ON DEMURRER TO A BILL IN EQUITY. <i>Samuel H. Fisher</i>	213
DOCTRINE OF THE UNITED STATES SUPREME COURT OF PROPERTY AFFECTED BY A PUBLIC INTEREST, AND ITS TENDENCIES. <i>Wm. Frederic Foster</i>	49
FAILURE OF MUNICIPAL GOVERNMENT. <i>Herbert K. Smith</i>	26
IRRIGATION QUESTION IN CALIFORNIA. <i>William P. Aiken</i>	122
KOWSHING, THE, IN THE LIGHT OF INTERNATIONAL LAW. <i>Tokichi Masao</i>	247
LEGAL PROFESSION IN SCOTLAND. <i>J. Dove Wilson</i>	109, 175
ORIGINALITY OF THE UNITED STATES CONSTITUTION. <i>Hon. Daniel H. Chamberlain</i>	239
POWER OF STOCKHOLDERS TO BIND THE CORPORATION. <i>Wm. Lloyd Kitchel</i>	83
RESPONSIBILITIES OF THE UNITED STATES INTERNATIONALLY FOR ACTS OF THE STATES. <i>Hon. Simeon E. Baldwin, LL.D.</i>	161
SURVIVAL OF THE THEORY OF NATURAL RIGHTS IN JUDICIAL DECISIONS. <i>John E. Keeler</i>	14
TAKING CORPORATE SHARES BY RIGHT OF EMINENT DOMAIN. <i>Leonard M. Daggett</i>	205

EDITORIALS.

ADJOURNMENT OF FIFTY-FOURTH CONGRESS	267
DEBT OF PACIFIC RAILROADS	94
EMINENT DOMAIN	143
JINGOISM IN AMERICA	31
JOINT TRAFFIC ASSOCIATION	226
MONROE DOCTRINE	141
NEW YORK POLICE COMMISSIONERS	30
OPENING OF FIFTY-FOURTH CONGRESS	93
POPULAR LOAN	187
PROFESSIONAL TRAINING	188
THREE YEARS' LAW SCHOOL COURSE	142
TORREY BILL	225
UNIVERSITY CATALOGUE	144
WORK IN LAW OFFICE	95
YALE CIVIL SERVICE REFORM LEAGUE	189
YALE HARVARD DEBATE	227

COMMENTS.

ATTACHMENT BOND	34
CHINESE EXCLUSION ACT	269
CITIZENSHIP OF UNITED STATES	193
CONDITIONS IN WILL	35
CONTRACTS IN RESTRAINT OF TRADE	145
CRIMINAL LIBEL	191
DIVORCE AND DISSOLUTION OF MARRIAGE	35
FOREIGN JUDGMENT	269
HOCKING VALLEY RAILROAD DEAL	147
INTERSTATE COMMERCE LAW	228
INVALID TELEGRAPH REGULATIONS	228
NORTHERN PACIFIC RAILROAD DIFFICULTIES	192
PATENT, SUING THE UNITED STATES FOR INFRINGEMENT OF	97
PROCESS ACT OF 1828	36
RELATION OF RAILROAD AND TELEGRAPH COMPANIES	98
WRIGHT ACT	96

YALE LAW JOURNAL

VOL. V

OCTOBER, 1895

No. 1

A BETTER EDUCATION THE GREAT NEED OF THE PROFESSION.

The lawyer is evermore the leader in society; and by society I do not mean that little coterie which lives simply to dine and wine, but that larger association of all individuals whose mingled labors have achieved the present, and will work out the future of human life and destiny. In society, in this better sense of the term, the lawyer is the leader.

Temporarily, it is true, he may be displaced by the soldier. In the abnormal and chaotic movements which accompany revolution and war the lawyer is ignored. *Inter arma leges silent.* The man on horseback becomes the leader, and around his life there is a pyrotechnic splendor which has lifted him into undue prominence, and made him too frequently the central figure in written history. But his leadership is always temporary, and conditioned upon some disarrangement of the normal condition of human society. When life is moving on in peaceful and regular lines the soldier drops to his appropriate place, as simply the representative of force—the one ready to help the lawyer as the true leader in all efforts which make for the bettering of human life and the coming in of a higher civilization.

So, in the early days of New England, the minister, for a while, superseded him. Legislation denounced him, and society under its theocratic leadership endeavored to forbid his presence, and exclude him from recognition. Washburn, in his *Judicial History of Massachusetts*, says:

“It was many years after the settlement of the colony, before anything like a distinct class of attorneys at law was known. And it is doubtful if there were any regularly educated attorneys who practiced in the courts of the colony during its

"existence. Lechford, it is true, was here for a few years, but he
 "was soon silenced, and left the country. Several of the magistrates
 "had also been educated as lawyers at home, among whom were
 "Winthrop, Bellingham, Humfrey, and probably Pelham and
 "Bradstreet. But these were almost constantly in the magis-
 "tracy, nor do we hear of them ever being engaged in the man-
 "agement of causes. If they made use of their legal acquire-
 "ments, it was in aid of the great object which they had so much
 "at heart—the establishment of a religious commonwealth, in
 "which the laws of Moses were much more regarded as prece-
 "dents than the decisions of Westminster Hall, or the pages of
 "the few elementary writers upon the common law which were
 "then cited in the English courts."

It is curious to note some of the legislation aimed to dispossess the lawyer from his rightful position, and exclude him from even existence in society. In 1656 the following statute was enacted in that colony: "This court, taking into consideration the great
 "charge resting upon the colony, by reason of the many and
 "tedious discourses and pleadings in the courts, both of plaintiff
 "and defendant, as also the readiness of many to prosecute suits
 "in law for small matters. It is therefore ordered, by this court
 "and the authority thereof, that when any plaintiff or defendant
 "shall plead by himself or his attorney, for a longer time than
 "one hour, the party that is sentenced or condemned shall pay
 "twenty shillings for every hour so pleading more than the com-
 "mon fees appointed by the court for the entrance of actions, to
 "be added to the execution for the use of the country." There
 was a crafty wisdom in this statute which commends itself to any
 one of much experience on the bench, and I venture to suggest
 that a similar act would to-day be sustained by every court. By
 an act passed in 1663, "usual and common attorneys" were ex-
 cluded from seats in the General Court, as the Massachusetts
 Legislature was called. But notwithstanding these efforts it soon
 developed that the needs of society were stronger than the wishes
 of the theologic advisers, and little by little the lawyer was lifted
 in even that theocratic society into his proper and accustomed
 place, and there, as elsewhere in the land, became the recognized
 leader.

To-day, wealth is striving to dispossess him from his position
 of leadership, and money is used to secure position and control,
 but with the ordinary result that place and power acquired alone
 by such means simply expose the possessor to ridicule and scorn.
 It takes something more than a \$200 silk nightshirt to make a

man a leader in social forces, and whatever of prominence and notoriety money may purchase, it never purchases the power to change the currents of life.

This leadership of the lawyer is not accidental nor enforced, but natural and resulting from his relations to society. That which binds society together and makes possible its successes and its blessings, is the mystic force which we call "law." It is that which transforms humanity from a mere aggregation of individuals, each by his own strong arm asserting his rights, into an organized society, the rights of whose individual members, as against one another, are enforced by the united strength of all, and in whose consequent freedom of personal action has been wrought out all the achievements of the past, and rest all the possibilities of the future. He, therefore, who voices the law, who is its interpreter, must inevitably stand in the front as the leader in the social organization, the one to direct the movement of all its uplifting forces. Sneer at it as any one may, complain of it as any one will, no one can look at American society as it is to-day, and has been during the century of national existence, without perceiving that the recognized, persistent and universal leader in social and political affairs, has been the gentleman of the green bag. A distinguished member of our profession said to me the other day in Nashville: "It is a curious fact that though there is no express authority therefor in any constitution or statute in the land, the lawyers have always been the rulers of this nation." We speak of our constitution as the wise organic instrument under whose provisions the nation has moved on to strength and glory, but that constitution was the handiwork of lawyers. They framed it, and they have interpreted it. Think how we should have drifted, and what a helpless mass of people we should have been without its grants, limitations and distributions of power. And, in a general way, the same may be said of every State Constitution, and of every statute. It is the brain of the lawyer which fashions them, and his brain that applies and makes them useful. As a general rule, made more conspicuous even by the few brilliant exceptions, the lawyer has been the legislator, the judge, and the executive.

The power which alone permanently controls and lifts upward is brain power, and brain power applied in such a way and to such forces as regulate life in its daily action. Leadership, however, does not attend on the mere name of lawyer. It will continue in him and become more or less potent as his capacity therefor improves or wanes, according to his increasing or lessening

fitness for interpreting the rules of human conduct and directing the movements of society. There is no physical force to compel his supremacy. He has no inherited right, and he must always stand intellectually in front if he would lead. Civilization lifts all men up. The schoolroom places each man on a higher level than his father occupied. Knowledge is not only more widely distributed, but also moving on a higher plane. And the lawyer of the future, to continue the leader, must be a wiser man than the lawyer of the past or present.

The thought of some is to dispossess the lawyer by giving to each man a knowledge of the rules of law, and you will find on many bookshelves such volumes as these: "Every Man His Own Lawyer," "The Business-Man's Guide,"—books aimed to place before all men the common rules for interpreting and controlling business transactions. Some fancy that with this diffusion of knowledge the need for the lawyer will cease. They who indulge in such fancy forget the fact that the many never keep pace with the few, that social and business relations become more complicated as civilization advances, and that with the complexity of those relations comes a multiplicity of rules and laws beyond the reach of the ordinary education of the many. There is as much difference between the few primitive rules that controlled society in its early stages of development and those which are now required for the management of its great and interlaced interests, as there is between the hatchet, the saw and other ordinary tools of the carpenter, and the marvelous and intricate machinery of our great manufacturing establishments. It may require but little time and effort to learn how to use a plane or a hand-saw, but to construct and keep in motion and order all the involved machinery of a great manufacturing establishment requires years of patient study and careful attention. So it may be that a little knowledge will enable one to go into a primitive society and advise as to the rules of law controlling its few transactions, but he who would stand in one of our great commercial cities as a power and a leader, advising and directing all its multiform affairs, must be a man of superior knowledge and large wisdom.

We hear many suggestions to-day as to the means necessary to make the law keep pace with the needs of advancing society. Law reform is a great cry. Simplicity in mode of procedure is thought by some to be the one thing needful. Far be it from me to belittle this demand. I do not wonder that the lawyer fell into disrepute when the highest effort seemed to be put forth in solving mere questions of pleading and practice, when the pride of

the lawyer was in tripping his adversary through a mere technicality, and when the outcome of too many a law suit was not the determination of the relative rights of the litigants but simply how nearly the pleadings on the one side or the other conformed to a technical and arbitrary system. Chief Justice Taney, writing of his professional experience, says: "In that day strict and nice technical pleading was the pride of the bar, and I might also say of the court. And every disputed suit was a trial of skill in pleading between counsel, and a victory achieved in that mode was much more valued than one obtained on the merits of the case." I am glad that law reformers have swung ponderous blows against the common law system of pleading and practice, and are striving to give the utmost simplicity to modes of procedure. Once in a while we see one of those technical devotees of ancient ways, whose delight is simply in the maneuvers of the court room. I remember one, who, employed to defend a chancery suit, wearied the court by the multitude of his dilatory, evasive, and technical pleas and motions. Finally, the judge, in his impatience, said to him, "Why do you take up my time with these frivolous and technical matters; why do you not come to the merits of the case at once?" and his reply, which illustrates so well the spirit of the old practitioners, was, "the moment I get to the merits of the case I lose all interest in it." No thoughtful man can doubt that simplicity in modes of procedure is of the utmost importance. The mere tools of the profession should be easily handled. Writing a pleading, or any other document, in a dead language is not the best evidence of the highest practical learning, or the greatest capacity. And it is to the credit of our profession that its members are rapidly coming to appreciate this truth; to realize that mere form is of trifling moment, and that substance of right and justice is the one thing to be striven for. God speed the day when a victory won by a trick shall ruin the lawyer who wins it.

Again, another demand is for more speed in the despatch of litigation. A slow procedure with free right of appeal from court to court and abundant license of indirect collateral attack was barely tolerable when life itself moved slowly, when business transactions were few, when travel was by canal boat or stage coach, when the mail was weekly or at best tri-weekly, and when leisure was abundant. The pure gold of truth and justice was finally separated, it is said, after being sifted through many judicial sieves. "*Jarndyce v. Jarndyce*" expressed even then the contempt of thoughtful minds. The law's delay became proverbial.

Now, when travel is by steam, and correspondence by electricity, when business transactions challenge the seconds in their flight, when men grow rich or poor in a fortnight, and all life moves in the hot haste of a Kansas cyclone, something must be done to bring the movements of the courts into harmony with the speed of other things. It is not strange that business men are compelling the members of their various commercial bodies to settle their controversies through committees rather than by law suits. Lawyers are proverbially conservative, and they do not change their habits or notions as easily or as quickly as some might wish. Precedent is an awful tyrant in our profession. What has been is to many the sacred law of what must be, and an iconoclast on the bench is a sacrilegious judicial monster. Even that tribunal of the nine black gowns glories in the past, and follows in its traditions, and the agonizing cry of the despondent dissenter, even in the income tax case, is that *stare decisis* is being stabbed in the house of its friends. *Et tu Brute!* When the court had little to do, the justices were wont to spend the morning hours of each Monday in reading at length what they had written during the prior weeks. What has been must be, and so, although the great stress of accumulating business demands every hour, the customs of the past still largely control. Some one has denounced in language too strong for me to quote the waste of time in reading to an audience of 100 or so that which is the interpretation of the law for 70,000,000 of people, who learn what has been decided not from the lips of the justices but from the pages of the press. And, I may add, the acoustic properties of the court room are so imperfect, and the voices of the justices generally so low, that scarcely half the scanty audience hear what is said. And when one speaks so that all in the room do chance to hear, the press dispatches announce to the world that the audible justice has made a stump speech from the bench. But "great is Diana of the Ephesians," and so for "about the space of two hours" every Monday morning the reading must go on.

Yet speed of itself may be more of a vice than a virtue. Important questions are not rightly decided unless fully considered, and the administration of justice would soon be pronounced a mockery if first impressions controlled every case. But greater expedition can be obtained without detracting from fullest examination and consideration. Shorten the time of process. Curtail the right of continuance. When once a case has been commenced deny to every other court the right to interfere, or take jurisdiction of any matter than can be brought by either party into the

pending litigation. Limit the right of review. Terminate all review in one appellate court. Reverse the rule of decision in appellate courts, and instead of assuming that injury was done if error is shown, require the party complaining of a judgment or decree to show affirmatively not merely that some error was committed in the trial court, but also that if that error had not been committed the result must necessarily have been different. It may be said that this would make reversals difficult to obtain. They should be difficult. The end of litigation should be almost always in the trial court. Business men understand that it is best that the decisions of their committees of arbitration should be final and without any review; while some of our profession seem to think that justice is more likely to be secured if by repeated reviews in successive courts, even to the highest in the nation, the fees of counsel can be made to equal if not exceed the amount in controversy between the clients. In criminal cases there should be no appeal. I say it with reluctance, but the truth is that you may trust a jury to do justice to the accused with more safety than you can an appellate court to secure protection to the public by the speedy punishment of a criminal. To guard against any possible wrong to an accused, a board of review and pardons might be created with power to set aside a conviction or reduce the punishment, if on the full record it appears not that a technical error has been committed, but that the defendant is not guilty, or has been excessively punished.

The truth of it is, brethren: in our desire to perfect a system of administration, one which shall finally extract from confused masses of facts and fictions the absolute and ultimate verities, we forget that tardy justice is often gross injustice. We are putting too heavy burdens on our clients, as well as exhausting the patience of the public. Better an occasional blunder on the part of a jury or a justice of the peace, than the habit of protracted litigation.

The idea of home rule and local self-government is growing in favor. Thoughtful men more and more see that the wise thing is to cast upon each community full responsibility for the management of its local affairs, and that the great danger to free government is in the centralization of power. Is it not in line with this thought that as far as possible the final settlement of all controversies which are in themselves local shall be by the immediate friends and neighbors of the litigants? Was not that the underlying thought of the jury as first established? And while we boast that the jury system is the great bulwark of our liberties, are we

not in danger of undermining its strength and impairing its influence by the freedom of appeals? Is not the implication therein that the jury and the trial judge cannot be trusted, and is not the sense of responsibility taken away from both when they understand that no matter what they may decide some superior and supposedly wiser tribunal is going to review all their decisions and correct whatever of mistake they may make?

We boast of the educating influence of the ballot-box, and say that only as each citizen realizes that the responsibilities of government rest upon him is possible the development of a perfect system of popular government. Is it not also true that the jury room has its educating influence, and that we ought so to adjust our system of jurisprudence that each juror shall come to feel that the responsibility for the administration of justice rests largely upon him?

But whatever of help may be in these suggested reforms, they are impotent of themselves to create the leader. They are simply a matter of machinery. The power must be in the man. The lawyer must be fitted to lead. For that a thorough education is necessary. And so I come to the thought which I wish to impress upon you; and that is: if our profession is to maintain its prominence, if it is going to continue the great profession, that which leads and directs the movements of society, a longer course of preparatory study must be required. A better education is the great need and the most important reform. The door of admission to the bar must swing on reluctant hinges, and only he be permitted to pass through who has by continued and patient study fitted himself for the work of a safe counselor and the place of a leader.

I do not propose to discuss the different methods of legal education, or compare the law school with the office, the case with the text-book. These are questions which others can and doubtless will discuss with far more ability and with the benefit of a larger experience. That which I wish alone to emphasize is the need of securing in some way to every one admitted to practice the benefit of a preparation therefor far surpassing that which most young lawyers now enjoy. I speak with the utmost freedom, for I did that which I now condemn. I hastened through my legal studies and was by the diploma of a law school and a certificate from a court declared fit to advise as to all rights and liabilities, and to carry on any litigation before I was old enough to be entrusted with the right to vote. I appreciated the mistake when I attempted to practice, and I fear some of my clients became equally aware of the fact.

But why is a higher education to-day the special need of the profession? Because, first, the law is a more intricate and difficult science than heretofore. The very complexities of our civilization and the multiform directions of human enterprise have not only increased the number but have also given greater variety to the rules controlling business transactions. He who would become qualified to counsel and guide must therefore have a larger legal lore, and that is only obtained by a more extended study and training. While it is true that the practice of the law is becoming divided into specialties, and we have the insurance lawyer, the railroad lawyer, etc., yet no man can become a successful specialist without a general knowledge of the rules obtaining in other departments than his own.

Because, second, to preserve the confidence of the community in the profession, each member must be qualified for the higher demands now made upon it. When society perceives that the great number are but slightly educated, how soon will the lawyer fall into disrepute. He will be only the object of the sneer of the cynic and the laugh of the wit. He will be thrown from his position of leader, and no longer sought after, respected, or followed.

Because, third, his mistakes are freighted with greater possibilities of injury. When business transactions are nothing more than an occasional barter of a chattel, or a simple contract for labor, a mistake works but little injury, and only to a few. But when they involve the great railroad and commercial dealings, so common to-day, a mistake may be fruitful of large and widespread ruin. So the responsibilities which rest upon us are greater than ever before, and we must rise to the level of those responsibilities, or both we and the society we attempt to lead will suffer.

Because, fourth, society each day of its advancing civilization needs and demands a wiser leadership. The welfare of humanity rests not on what has been accomplished, but on the steps forward which it takes. If those steps are wisely advised and prudently taken, then we may confidently look for the coming in of the day of which poets have sung, and which prophets have foretold, when peace and righteousness shall fill the earth. While, on the other hand, if illy advised and rashly taken, progress ceases and society resolves itself again into the anarchy and chaos from which it has so slowly arisen. It has often been said that a community is no better than its leaders, and while there may be temporary exceptions, that is certainly the general rule. So if we would have a

steady advance in social order we must have an equally constant advance in the character and accomplishments of the lawyers, its leaders.

I know that mere education is not all-sufficient. There must be a man to be educated. It is an old saying that you cannot make a silk purse out of the caudal appendage of the female swine. No more will any amount of study and training pour legal lore into some craniums or give that rare and blessed gift, common sense. Still that does not prove that there is no need of education. Henry Ward Beecher once said that dress does not make the man, but when the man is made he looks a great deal better dressed up. So while mere study will not supply the lack of legal capacity, given one capable of becoming a lawyer, and a thorough education will place him in the front.

The strength of an army is not in its numbers, but in its discipline and training. Cortez, with a handful, rode through thousands of opposing Mexicans and entered the capital city in triumph. Japan's disciplined troops saw scarcely anything else than the backs of the fleeing Chinese, and the most numerous people on the face of the earth were conquered within a few weeks. So it is with our profession. Its power lies not in the mere number of its members, but in their learning and capacity. A single true and noble lawyer is strength and glory, while a thousand pettifoggers are weakness and shame. In our late war, with its millions of volunteer soldiers, who became the victorious leaders? The trained students of military science. Their education had fitted them to lead. The great movements of civilized society upwards are struggles, though not wars. Who can lead in those movements? Mainly the trained lawyers, they whose long study of human rights and obligations enables them to place before each individual the limits of action, and to guide into paths of life and conduct, which are ways of pleasantness and paths of peace, and so the paths through which civilization moves on and up.

It may be objected that if the course of study is extended and the conditions of admission to the bar increased a great many will be deterred from entering the profession. A perfect answer is that a great many ought to be deterred. A growing multitude is crowding in who are not fit to be lawyers, who disgrace the profession after they are in it, who in a scramble after a livelihood are debasing the noblest of professions into the meanest of avocations, who instead of being leaders and looked up to for advice and guidance, are despised as the hangers-on of police courts and the

nibblers after crumbs which a dog ought to be ashamed to touch. Even of those who would love to keep up the dignity of the profession many find no adequate compensation from the practice, and so mingle with it dealing in insurance, real estate, and kindred matters, to eke out the living the law does not furnish. It would be a blessing to the profession, and to the community as well, if some Noachian deluge would engulf half of those who have a license to practice. Webster's reply to the question whether the profession was not crowded was that the first story was full but that there was plenty of room in the second. We should see to it that there be no first story, and that only second-story lawyers be found on our rolls.

It is said that some of the noblest of our members would be shut out from the law and turned into other pursuits. If a four years' course of study had been required, would Abraham Lincoln have become a lawyer? My reply is two-fold. First, seldom would any one capable of becoming a hero of the bar be turned away. Obstacles only stimulate the efforts of such men. They work their way up in spite of all difficulties. They glory in their ability to overcome all opposition. Secondly, if perchance some one worthy of a place on our rolls should be kept away there will be plenty left. The general level of professional standing should not be lowered for fear some single chieftain is never found.

Finally, it is objected that the high standard should not be insisted upon, because in our hamlets and smaller villages there is room for very ordinary lawyers. This is a mistake. There is no place anywhere on the face of the earth for a cheap lawyer. It is true that in a village there may be but little business, true that many transactions are of such a simple character that a limited knowledge of the law will guide one safely through them; but it is also true that the relations between the villages and the great business cities are becoming more and more intimate, and are such that often the highest legal lore is required to properly advise the dwellers in the former as to their rights, duties and liabilities, and so the lawyer in the village must be qualified to meet the lawyer in the city on equal terms. Further, he will represent the village in the Legislature, and he should be able to make that village a power in the legislation of the State. There should be a general lifting up of the profession so that all its members everywhere be recognized as leaders.

The final peace of the world will be wrought out through our profession. I know the poet sings of the day

"When the war drum throbs no longer and the battle flags are furled
In the parliament of man, the federation of the world."

But the poet is mistaken. The legislator will not bring the day of universal peace. There will never be one great parliament, one Federal republic embracing all races and ruling the world. The law of race individuality with its consequent differences and antagonisms cannot be overcome. Gaul and Teuton, Slav and Saxon will never become one people. Blood is thicker than water. Because individuals of these varied races come to this new land of ours and dwelling as neighbors are slowly moving towards one homogeneous people, it does not follow that the law of race will ever be forgotten or ignored in the native land. The vision of one great nation with a single parliament is only a poet's dream. But the lawyer will work out the final peace and bring in the glad day when the spear shall be turned into a plowshare and the sword into a pruning hook, and nations shall learn war no more. In each separate nation as it advances in civilization more and more are differences settled and rights adjusted by the lawyer and the judge, rather than by the pistol and bowie-knife; so as the world advances in civilization will differences between nations be in like manner settled. Arbitrations are growing in favor, and international courts will soon be a part of the common life of the world. I know the time may seem far distant when any such court shall come into existence. It will be witness to a great advance in civilization, and yet within the last fortnight I have seen it stated in the papers that the French Assembly has unanimously passed a resolution looking to the establishment of some tribunal of arbitration to settle all differences that may in the future arise between that nation and this country. The world is becoming familiar with international arbitrations, and the settlement of disputes thereby; and every successful arbitration is but a harbinger of the day when all disputes between nations shall be settled in courts of peace and not by the roar of cannon and waste of blood.

When in youth I studied the structure of our government, I looked with awe and reverence upon the Supreme Court of the United States, a tribunal taking no cognizance of the minor disputes between individuals within the several States, but sitting in judgment upon the weightier controversies between States and citizens thereof, and determining the rights and liabilities of States to each other and to citizens. I thought of the solemn sense of responsibility which must rest upon each justice thereof as he came to the decision of every case. The years have brought me to a place on that bench. With a profounder reverence and a personal sense of responsibility I now look upon that court and its work, and I would that every judgment it pronounces should be

wrought out with such wisdom as through the long stretch of coming years to stand the supremest test.

Does it tell of the coming on of second childhood, or is it proof of a growing confidence in man and his capacity for self-control that I now look with the full assurance of faith to the dawning of a day when some great international court shall come into being, whose judgments, touching no questions between individuals, shall determine all controversies between nations, and by such determinations bid the world's farewell to the soldier? But by whom shall such a tribunal be established, and who is to sit therein and render the judgments which shall command such confidence and respect that willing obedience thereto be yielded by all? Out of the rich brain of our profession shall be wrought the form and structure of that court, its fashion and its glory, and the lawyers shall be the judges thereof.

So believing, let us all strive to lift the standard of professional character and acquirements so that no one shall ever think of challenging our place in the front.

David J. Brewer.

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SURVIVAL OF THE THEORY OF NATURAL RIGHTS IN JUDICIAL DECISIONS.

The doctrine of natural rights was a favorite one with political philosophers and with jurists in the Eighteenth Century. They held that there were rights which existed in a "state of nature" inherent in every individual, and which he retained in the political community to which he belonged by virtue of the nature of the "social contract," or "social compact," which was supposed to underlie all political organizations, and that these rights were "natural rights," and their recognition was founded on principles of "natural justice." These rights and principles, although not founded in positive law nor created thereby, were yet superior thereto and of paramount authority, and were to be recognized and enforced by legal tribunals in derogation of the authority of positive law in cases where the latter seemed to be in conflict with such principles.

The immense effect of these doctrines in the political upheavals of the latter quarter of the century is one of the commonplaces of history, and the catch-words of the discussion passed from the pages of philosophic and juristic literature to the speech of everyday debate among the unlearned. They took root and were much in vogue in the United States during the war of independence and the period of constitution-making which followed, and did not fail to strongly influence the subsequent period of early constitutional interpretation, when the lines of demarcation between legislative and judicial authority came up for settlement in cases before the courts.

The struggle that ensued assumed two phases. On the one hand it was contended that courts had no power to hold void a law in conflict with the constitution of a State; while at the other extreme it was claimed that not only did they possess this power but the further power to declare invalid laws which were deemed contrary to the principles of natural right or justice, or in conflict with the maxims which were supposed to be embodied in the social contract or compact. The power to hold a law void because unconstitutional soon became firmly established, although not without a good deal of violent and unseemly conflict between

legislatures and the judiciary, resulting in removals and impeachments in several of the States, and in impeachments of two judges of the federal courts, one of the latter that of Judge Chase of the Supreme Court of the United States. The second claim, as above stated, made on behalf of the judiciary was not to any extent successful, and it is now the accepted doctrine in most jurisdictions that the only limits to legislative action in the various States are set by their respective constitutions and the Constitution of the United States, or, as the doctrine is clearly stated by Judge Cooley:¹ "The rule of law upon this subject appears to be, that, "except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, "whether it operate according to natural justice or not in any "particular case. The courts are not the guardians of the rights "of the people of the State, except as those rights are secured by "some constitutional provision which comes within the judicial "cognizance."

This is unquestionably the prevailing doctrine, as is established by the numerous citations given by the authority quoted, and many more which might be added. Still there are jurisdictions in which the contrary view was, and still is in a measure, asserted.

It is not the purpose of this article to vindicate the commonly received opinion, nor in the main to attempt to refute the opposing claim, but to examine the cases in which the latter is upheld, and consider the form in which it is maintained, and the scope of the application claimed for it.

The doctrine received some consideration by the Supreme Court of the United States in the earlier period of its existence. The case of *Calder v. Bull*, 3 Dallas 270, came up on a writ of error from the Supreme Court of Connecticut. The legislature of that State had granted a re-hearing in the probate court of Hartford after the expiration of the time in which, by the then existing law, a review of such a proceeding could be had. This action had been upheld on appeal by the Supreme Court of Connecticut, and it was claimed in the Supreme Court of the United States that the law was *ex post facto*, and in contravention of the Constitution of the United States. The further claim was probably made in argument that the act was void for more general reasons. The court held the act to be valid, and a legitimate exercise of legislative power under the charter of Connecticut, for that State had as yet adopted no constitution, and laid down the

¹ Constitutional Limitations (4th Ed.), p. 204.

doctrine, since firmly established, that the prohibition of *ex post facto* legislation extended only to statutes dealing with the criminal law. In giving his opinion in the case, however, Justice Chase took occasion to speak generally as to the limits of legislative power, in part as follows: "I cannot subscribe to the omnipotence of the "State legislature, or that it is absolute and without control, "although its authority should not be expressly restrained by the "constitution or fundamental law of the State. * * * The "purposes for which men enter into society will determine the "nature and terms of the social compact; and as they are the "foundation of the legislative power, they will decide what are "the proper objects of it. The nature and ends of legislative "power will limit the exercise of it."

It is quite significant that the opposing and now generally received doctrine found utterance in the opinion of Justice Iredell in the same case. He concurred in the decision for the reasons given in the leading opinion, but took occasion to dissent from the dictum above quoted, saying: "If, then, a government composed of legislative, executive and judicial departments were "established by a constitution which imposed no restraint on the "legislative power, the consequence would inevitably be that "whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to "pronounce it void. It is true that some speculative jurists have "held that a legislative act against natural justice must in itself "be void; but I cannot think that under such a government, any "court of justice would possess a power to declare it so." If "the "legislature of the Union, or the legislature of any member of "the Union, shall pass a law within the general scope of their "constitutional power, the court cannot pronounce it to be void, "merely because it is in their judgment contrary to the principles "of natural justice."

In the noted case of *Fletcher v. Peck*, 6 Cranch. 137, Chief Justice Marshall in giving the opinion of the court, wherein it was held that the revocation of a legislative grant by subsequent legislative act was void as impairing the obligation of a contract, goes into the consideration of the great injustice of such procedure, and adds: "It may well be doubted whether the nature of society and "government does not prescribe some limits to legislative power."

In *Terrett v. Taylor*, 9 Cranch. 43, certain legislative dispositions of the property of the Episcopal Church in Virginia were held obnoxious to the federal constitution as impairing the obligation of contracts, and Justice Story in his opinion characterizes

such acts as "utterly inconsistent with a great and fundamental "principle of republican government, the right of the citizens to "to the free enjoyment of their property legally acquired." Just how far the court would enforce this principle against legislative action not in conflict with any constitutional provision he does not intimate.

In *Wilkinson v. Leland*, 2 Peters, 657, which came to the court from the Circuit Court for the District of Rhode Island, and involved the validity of an act of the Legislature of the State, validating a defective conveyance by an administrator under order of court, Justice Story went somewhat largely into the question of the general limits of legislative power. Rhode Island was still living under its colonial charter as the fundamental law, and its provisions were, to say the least, vague. The discussion at the bar seems to have taken a wide range, and the validity of the law to have been fortified by reliance on the plenary power of the legislative, as well as on narrower and more specific grounds. The validity of the law was sustained, but the learned justice characterized the claim above noted as inconsistent with just principles. He observes that "Even if such authority could be deemed to "have been confided by the charter to the General Assembly of "Rhode Island, as an exercise of transcendental sovereignty "before the Revolution, it can scarcely be imagined that that "great event could have left the people of that State subjected to "its uncontrolled and arbitrary exercise."

Such arbitrary exercise, it may be observed, would appear to have been guarded against by the provision of the charter requiring laws to be "as near as may be agreeable to the laws of England." And indeed, Justice Story seems to have so held, and does not in terms claim for the court the power to hold the law invalid even had the court considered it oppressive and opposed to natural justice.

This view received no further development in this court, and although pressed in an argument by eminent counsel, was emphatically repudiated by Chief Justice Chase in the *License Tax Cases*, 5 Wallace, 459.

The doctrine appears in two early cases in South Carolina. The first that of *Ham qui tam v. McClaws et al.*, 1 Bay. 91, arose in the consideration of a statute passed in 1788, forbidding the importation of Negro slaves owned by aliens, and imposing a fine and forfeiture. The Court so construed the law (stated to have been "hastily penned") as to make it inapplicable to the defendants, for no other reason apparently than that the latter did

not know of the existence of the law, when they sailed from Honduras to South Carolina with their slaves. Although the desired end was attained by construction, the Court adds in its opinion: "It is plain that statutes passed against plain and obvious principles of common right and common reason are absolutely null and void, so far as they are calculated to operate against these principles." In *Bowman v. Middleton*, 1 Bay. 250 (1792), the Court held a private act of the Legislature passed in 1712 which transferred the property of one person to another without any hearing to be void. The eighty years' possession of the beneficiary of the act and of his grantees was passed by with some very slighting observations on the statute of limitations, and it was decided that "the plaintiffs could claim no title under the act in question, as it was against common right as well as against Magna Charta."

The act in question was contrary to at least two of the provisions of the South Carolina Constitution of 1790, but the instrument of course had no application to a law of the early date of the one considered by the court. It may well be doubted whether the colonial legislature of the royal province of South Carolina had any authority to pass a law in contradiction to Magna Charta or any other fundamental law of England, and perhaps that idea may be implied in the language above quoted.

The cases heretofore considered were decided in the early and formative period of our jurisprudence, and the doctrines enunciated therein were not followed out in subsequent judicial decisions; but in the States of Maryland and Connecticut similar and more explicit recognition of such doctrines has prevailed down to a very recent period.

The first time the claim was made in Maryland, what may be called the orthodox view was sustained by the Court of Appeals in *Whittington v. Polk*, 1 H. & J. 236. A statute depriving a judge of his office during his legal term and vesting the same in another person was upheld, although the Court said, "it is an infraction of his right, and incompatible with the principles of justice, and does not accord with sound legislation."

Somewhat later came the case of *Regents of the University v. Williams*, 9 G. & J. 395, wherein was called in question the right of the legislature to make certain radical changes in the charter of the University of Maryland, which affected seriously the vested rights of that corporation. The Court held the legislation invalid as contravening the constitutions of Maryland and of the United States as well, and further asserted that independent of both

constitutions "there is a fundamental principle of right and justice, "inherent in the nature and spirit of the social compact (in this "country at least), the character and genius of our government, "the causes from which they spring, and the purposes for which "they were established, that rises above and restrains and sets "bounds to the power of legislation, which the legislature can "not pass without exceeding its rightful authority. It is that "principle which protects the life, liberty and property of the "citizen from violation, in the unjust exercise of legislative "power."

After so emphatic and distinct an enunciation of principle, it is not strange that it was frequently invoked in subsequent cases in Maryland. In *Baughner v. Nelson*, 9 Gill 307, the question of the right of the legislature to change the usury law as to allow a recovery upon a contract made previous to the change, when the excessive interest was remitted, came up for adjudication. The act was seriously questioned as being unjust and within the scope of the doctrine of *Regents v. Williams*, above quoted. The court affirmed the doctrine, but denied that the law was in any way obnoxious to it.

During the height of the anti-slavery agitation in the year 1859, it was sought to make the city of Baltimore a very uncomfortable place for those not in sympathy with the peculiar institution. An act was passed by the legislature of Maryland, which practically put that city under martial law in time of peace, by the adoption of a novel form of civil administration. A police board was created with extraordinary powers, and all the ordinary officials of the city and the sheriff of the county were subordinated to it. Power was conferred to levy taxes, issue certificates of indebtedness, to call out the militia, and to do about everything of a repressive nature in the most summary manner. The act concluded with a provision "that no Black Republican, or "endorser or approver of the *Helper Book*" or such persons as should resist the provisions of the act, should be appointed to any office by the board, and a form of oath was provided for all officials high and low which would do credit to a juvenile secret society. The social compact appeared to be stretched to the limit of elasticity, and natural justice to be wounded in the house of its friends.

When the validity of the act was contested in the case of the Mayor of Baltimore *v. the State*, etc., 15 Md. 376, it was strenuously insisted that the same was void as opposed to natural justice, as well as on various constitutional grounds, but without avail.

The court made the usual affirmation of the soundness of the doctrine, but held its protection was limited to the private rights of individuals and private corporations when invaded by legislative action, and it had no application to restrain the creation of any governmental agency in the way of a public board or corporation. It may be interesting to observe in passing, that as regards the exclusion from office of Black Republicans and supporters of the Helper Book, the Court remarked that if the act intended to exclude any class of persons on account of political or religious belief it was unconstitutional, "but as the Court can not officially understand who are meant to be affected by the proviso, no "judicial opinion can be expressed."

In *Harrison v. State*, 22 Md. 494, involving a law validating marriages of uncles with nieces theretofore invalid; in *Mayor of Hagerstown v. Sehner*, 37 Md. 191, wherein was drawn in question a law lengthening the period of the statute of limitations; in *Cohen v. Jarrett*, 42 Md. 575, which was concerned with the validity of the liquor license law; and in *Talbot Co. v. Queen Anne Co.*, 50 Md. 260, in which a tax law apparently of very unequal application as between the counties of the State was considered, the principle announced in *Regents v. Williams* was affirmed as good law, but held either inapplicable, or else not in any way invaded.

We now pass to a consideration of the Connecticut decisions. That State had continued under the charter of Charles II. as its fundamental law until 1818, when its constitution was adopted. The charter made no marked distinction between legislative and judicial powers, and the general court, as the legislature was called from the beginning, exercised judicial functions at first in a very large degree, but afterwards from time to time, by various laws, vested more and more authority in the courts. Still the legislature retained and exercised up to the adoption of the constitution a substantial residuum of judicial power. Hence, very many of the constitutional questions that had been agitated in other jurisdictions could not well arise in the Connecticut courts until the constitution, with its more distinct separation of governmental functions, came in force. At that time constitutional questions arose with frequency. The people had a new thing, and were anxious to discover what there was in it.

The extent of legislative power was soon drawn in question in the case of *Goshen v. Stonington*, 4 Conn. 209. The legislature had confirmed certain invalid marriages, and as the consequence of its action, the legal settlement of certain paupers was affected,

and gave rise to the case cited. The decision is given largely to the discussion of the effects of retroactive laws on vested rights, and is a leading one on that point. Toward the end of the opinion by Chief Justice Hosmer he disposes (p. 225) of the question of legislative power to enact laws such as that under consideration by enunciating the doctrine that enactments of this sort are to stand or fall in accordance with the judicial opinion of their justice. The law in question was upheld, as on the whole just, but the plenary power of the legislature, subject only to constitutional restraint, is denied in the following terms: "With those judges who assert the omnipotence of the legislature in all cases where the constitution has not interposed an explicit restraint, I cannot agree. Should there exist—what I know is not only an incredible supposition, but a most remote improbability—a case of direct infraction of vested rights, too palpable to be questioned, and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary. If, for example, a law were made to deprive any person of his property, or subject him to imprisonment, who would not question its legality, and who would aid in carrying it into effect?" Judge Cooley in commenting upon this passage makes the pertinent remark that the first example suggested would be an exercise of judicial functions outside of the legislative power, and the second a bill of attainder.

In *Mather v. Chapman*, 8 Conn. 54, and *Beach v. Walker*, 8 Conn. 190, the doctrine of *Goshen v. Stonington* is affirmed, in opinions by the same judge. In each case the law considered by the court was an act validating irregular levies of execution on real estate, highly remedial and entirely proper, but acting retrospectively, and the laws were held valid. In the opinion in the latter case the judge states the doctrine in a different form, and views it as an aid to legislative acts of a retrospective nature, for reasons which he thus expresses: "Every act of the legislature intrinsically implies an opinion that the legislative body had right to enact it; and the judiciary will discover sufficient promptitude, if it determine a law to be invalid, that operates by retrospection unjustly on person or property. This principle steers a correct medium, admitting the sovereignty of the legislature to do justice by an act unquestioned by the court of law; while it equally repels the supposed uncontrollable omnipotence of the same body to require the observance of an unjust law, in subversion of fundamental rights, and in opposition to the social compact." He adds that unless the doctrine thus enunciated

be embraced "this extreme would be resorted to that every "retrospective law, however just or wise, affecting the property "of an individual, must be considered as of no validity." This dilemma hardly follows from the above reasoning, and courts have in later days found little difficulty in doing justice with reference to retrospective laws by use of accepted canons of construction, and by due regard to express constitutional restraints, without falling back on natural justice or the social compact.

After the enunciation of the doctrine in the Connecticut cases thus far considered, there seems to have been a change in the tide of judicial opinion, and in the case of *Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475, Church, J., in the opinion of the court, speaking of retroactive laws in general, apparently lays down the principle that where such laws do not conflict with the constitution, the only way the judiciary can deal with them in way of modification is by construction, saying: "As the judiciary is not "the guardian of the legislature, but is the weaker department of "the government, possessing no *veto* power over acts of constitutional legislation, more properly belonging to the executive, we "cannot disregard a legislative enactment, because it is retroactive in its purpose and effect, whatever may be our opinion of "the general policy of such laws. It belongs to us rather to settle the questions of constitutional power, than questions of policy. " * * * There may not be any great difficulty in determining "what are the principles of natural justice, nor what would tend "to undermine what theorists may suppose to be the fundamental "principles of the social compact, especially by those who acknowledge the precepts and obligations of revealed religion; yet these "principles are not always of easy and undoubted application to "the infinitely varied forms of human action. And we know of no "other municipal power which can more safely make such application than the legislature; and as a court, although we might "dissent from its conclusions, yet we disclaim any right to disregard them, for no other reason than that we might consider "them unreasonable, impolitic or unjust."

In *State v. Wheeler*, 25 Conn. 290, the Supreme Court of Connecticut still further receded from the doctrine of the earlier cases, in a case involving the liquor license law. The law was opposed, as contrary to natural right; and Storrs, J., says in the opinion: "We are by no means prepared to accede to the doctrine involved "in this claim, that under a written constitution like ours, in "which the three great departments of government, the executive, legislative, and judicial, are confided to distinct bodies of

"magistracy, the powers of each of which are expressly confined to its own proper department, and in which the powers of each are unlimited in its appropriate sphere, except so far as they are abridged by the constitution itself, it is competent for the judicial department to deprive the legislature of powers which they are not restricted from exercising by that instrument." He further, however, says that the law is open to no objection of the kind urged, and there is no occasion to pursue the topic of extra constitutional restriction. This is noticeable as the first time where the point was urged against a law not retrospective in its character, and having no relation to vested rights. Had the line of cases stopped here one would be justified in saying that the earlier doctrine was overruled. But the next time it came before the court it was asserted as comprehensively as before, and in more general and sweeping terms. In *Welch v. Wadsworth*, 30 Conn. 149., Butler, J., delivering the opinion of the court upon the question whether an act validating certain usurious contracts was to be sustained, after remarking that the act did not conflict with the constitution, and was presumably within the competence of the legislature, proceeds: "But the power of the legislature in this respect is not unlimited. They cannot entirely disregard the fundamental principles of the social compact. Those principles underlie all legislation, irrespective of constitutional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void." As usual, the act was found to square with natural justice and the social compact.

In *Booth v. Woodbury*, 32 Conn. 118, the same judge in the opinion of the court considers that the act in question (one conferring bounties on volunteers in the war of the rebellion) solely as to its accordance with natural justice, making that the only test, and elaborately justifies it on the ground that it so accords, maintaining that if the "making of the gift will be promotive in any degree of the public welfare it becomes a question of policy and not of natural justice; and the determination of the legislature is conclusive."

In *White v. Town of Stamford*, 37 Conn. 578, the lower court was asked to enjoin the erection by the defendant town of a large public building to be used mainly as an investment for revenue purposes and only incidentally for public use, and also to enjoin the issue of bonds to pay for it, which acts had been authorized by a special law. The case was reserved for the advice of the Supreme Court, and it was claimed that the act was void as "against common right and in violation of the fundamental

"principles of the social compact." Seymour, J., in the opinion of the court says, "We are not insensible to the force of the objections against extending the power of towns so as to enable them to engage in private business, but the power which the court is called upon by the petitioners to exert in this case is a power to be exercised only in the clearest cases. * * * The courts of Connecticut have never to our knowledge exercised the power now invoked, of holding an act of the General Assembly void, merely because of its being in violation of the social compact, and we would not commence the exercise of that power in a case of any reasonable doubt." How easy it is for a court to find itself in doubt the cases heretofore examined show. The same court has, so to speak, confessed and avoided the doctrine in the later cases of *Linsley v. Hubbard*, 44 Conn. 109; *Wheeler's Appeal*, 45 Conn. 319; and *State v. Wordin*, 56 Conn. 227; and has incidentally referred to it in a number of other cases. The expressions regarding it vary, quite as we should expect, with the temper of the judge writing the opinion, and one of them after mentioning the social compact has the irreverence to add, "whatever that may mean."

From the above examination of cases, extracts from the more important of which have been given, it appears that the doctrine of extra-constitutional limitation of legislative power, has been, in the jurisdictions mentioned in this article, frequently maintained, with more or less fluctuation of expression and sometimes with clearness and emphasis; but that there is no case in which a law in any State having a constitution at the time of its enactment has by the Court been held invalid, except where in conflict with constitutional provisions. If the power claimed by the doctrine exists, it has never been exercised. Its assertion seems to be a sort of judicial swagger, never ending in a fight. And the reason is not far to seek. In the first place, the sovereign people have placed in their constitutions ample restrictions on legislative action; and again the expedient of construction is always open to the court, and is bounded only by the limits of human ingenuity. With such resources at command natural justice can be safeguarded from rash legislation, without exalting it to a position above positive law constitutionally enacted.

In view of this it may well be questioned, whether it would not be better for the courts of those jurisdictions which still maintain the doctrine to frankly overrule it and fall into line with the overwhelming majority of the States of the Union, rather than continue its empty assertion. The doctrine of natural right above law and not created by law has been maintained in academic

discussion, in philosophic dissertations on government, and in kindred works which have been aptly said to treat of "juris-prudence in the air," for centuries; and it will probably always continue to be defended in company with perpetual motion, circle squaring and the Baconian authorship of Shakespeare. But it has always been rejected by the healthy instinct of the community, when practical matters of government are concerned. It does not work. A sound political philosophy can only be deduced by observation of the working of political institutions past and present; the judiciary of most of the States of the Union have, in the light of experience, guided by such observation, worked out the rule as quoted from Cooley near the beginning of this article; it is the rule in most of the States, it represents the practice in all. Why then should not the rule be uniform throughout the country?

John E. Keeler.

THE FAILURE OF MUNICIPAL GOVERNMENT.

TOWNSEND PRIZE ORATION.

Twenty-five years ago, four men of obscure origin and of meagre ability, vicious and ignorant, sat in the City Hall of New York, and under the thinnest disguise of legal form, made absolutely their own, for their own uses, the vast financial and political power of a million of people

In theory, our city government is a government by the people, through their official servants acting solely for the common good. And yet in practice the utterly arbitrary and despotic system that the Tweed Ring represented has lived and ruled in our larger cities from that day until 1895 and it is hard to believe that it will not be still supreme when the twentieth century opens.

The chief characteristic of all city life is community of local interests, and to provide for these interests is the object of city government. The modern city is essentially a concentration of power. Its forces, if rightly directed, would make it the highest agent of civilization. And yet we of America have so wretchedly failed of attaining these great possibilities that we must look to our kindred of England and Scotland merely to learn what these possibilities are.

Our experience has been such that the denizen of the average American city would hardly believe a detailed account of what the citizens of Glasgow or Manchester get for their taxes. Their city work is done by the highest experts, honestly, cheaply and well. Their street franchises are leased as private financiers would lease them and yield enormous returns. Their public undertakings are vast, and numberless, and take account of the distant future. In a word their city government is not politics, but business.

Ours on the other hand is a blot on the Nineteenth Century. Its only semblance of success is in the preservation of the public peace. We do not receive a twenty per cent. return for our taxes. Our city service in streets, in sanitation, in education is wasteful, flagrantly inadequate, and bad at that. Public officers are unfit for their duties. Corruption is the ear-mark of a city contract. The commission of crime a matter of bargain with the

police, and provision for a future a thing unknown. It is summed up in that common feeling which regards the agencies of the public as mere private spoils.

During the past thirty years the United States has presented a singularly curious anachronism in the history of government. We have practically reproduced in our city government of to-day the feudal system of the Twelfth Century. This is no metaphor. In the science of politics the feudal noble is accurately represented by the city boss of to-day; his vassals by the "ward heelers," and his serfs by the inhabitants of the city at large. The two systems rest on the same political principle. The distributor of lands has become the distributor of public office, and his "heelers" render him their political services as the vassals of old gave their military support to their lord. With your permission I will endeavor to outline certain peculiar features of our political condition which make this "Boss System" possible and inevitable. First of these is that pet dogma of ours, "manhood suffrage." By what Bryce has called "A sacrifice of common sense to abstract theory," we give to the ignorant and corrupt as much influence on our city affairs as to the most enlightened and patriotic. The balance of political power is thus put up for sale in that particular market where the boss is always the highest bidder.

Second is the fearful complexity of the governmental machinery of our cities, by which the voter is mystified, the issues are confused, and an elaborate arrangement is made for a division and final evasion of all political responsibility.

Third is the corrupt use of the power of the legislature over the city to create special conditions in municipal affairs adapted to the wants of the boss. In the great fights with the Tweed Ring in New York and the Gas Ring in Philadelphia the Legislature proved to be the key of the position.

Fourth is our traditional party feeling which robs the elective franchise of its judicial quality. The boss, who is never really either Republican or Democrat, but merely plain professional, values highly this party sentiment as an enemy of calm judgment.

These are the conditions that make the boss system not only possible, but inevitable. For it must be always remembered that the boss and the heeler are only the products of the forces about them. Remove these conditions and the system itself will die.

What, then, is the fundamental mistake at the bottom of our misgovernment? Manifestly this. We have failed to recognize the inherent difference between the political nature of a city and

that of a State, and we have applied to the city, without regard to their fitness, the principles that have worked so well with the State.

Thus theory demanded that manhood suffrage, as in the Federal system, be also made the basis of city government. Yet the city is primarily a business organization, and the commonest kind of common sense gives to the shareholder in a business concern an influence on its affairs proportioned to the extent of his interest therein. We misapply theory once more in making the forms of our city governments reproductions. Checks and balances may be necessary in Federal politics. Deliberation is there of more importance than swift decision. But the functions of the city relate almost wholly to business, and should follow modern business methods. It is a truism to say that this means the centralization of power in a single hand. How long would a railway survive a management of checks and balances and manhood suffrage? Great Britain has recognized both of these principles. By imposing a very slight tax qualification on voters, the English cities have practically wiped out that mass of venal and ignorant votes, which is here the chief reliance of the boss; while by placing all the powers of the city in the hands of a single elective council, they have attained almost perfect efficiency and direct responsibility. In final contrast to ours, their legislature interferes in city affairs only by general municipal acts. The experience of the city of New York with her legislature of the present year would amply justify this policy.

It is often stated and is widely felt, that in the nature of things the government of cities must always be a failure. The continuance of this idea is in itself enough to destroy all chance of improvement. The foregoing analysis of the causes of our failure has therefore been made as an attempt to show that this idea is not true, but that city government, in the abstract, is perfectly capable of success. Recall the suggested causes of failure. We have first, manhood suffrage; second, the misapplication of the Federal system to the peculiar conditions of city life; third, the excessive interference of the legislature in city affairs; fourth, party feeling. Now not one of these conditions is a necessary or natural incident of city life, as such. The first three, manhood suffrage, complex charters, legislative interference, are all artificial, purely the work of law. The fourth, party feeling is perfectly capable of being confined to national affairs. The English cities stand for us as examples of good government. Yet they do not differ from ours in those fundamental attributes which belong

to the city as a city. In the congestion of population, in race characteristics, in the concentration of economic forces, they are essentially like ours. On the other hand they do differ from ours in being free from those conditions which I have just called artificial and unnecessary. The inference, therefore, is inevitable, that in this difference, and this alone, lies the reason for their success and our failure.

If this be so, our work for the future is to remove these hampering conditions. Since our cities lead our civilization, since an ever increasing proportion of mankind seems destined to pass its days and seek its happiness under the conditions of city life, the interests of the race are vitally involved in this change. How soon, if at all, this great advance shall be made, is a question of public education. The prophecy of the times is clearer than ever before. The citizen is beginning to enquire into the causes of his misgovernment. It is true, the public has been aroused to anger before, but its mere anger, though effectual for the time, is always short-lived. Now it combines wrath with reason, and strikes, not at the thing itself, but at its cause. Show the country what that cause is, that it may squarely attack it, and the old system will go down, and we shall learn at last that incompetence, waste and corruption are not the necessary incidents of city life but that it holds in store tremendous possibilities for the good of mankind.

Remember that historic phrase: "What are you going to do about it?" Thus the challenge of this vile Nineteenth Century despotism was flung in the face of the country, when the famous boss put to the struggling city of New York his mocking query. Sooner or later the people of the United States will answer that question.

Herbert Knox Smith.

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THE lack of comprehension of the relative duties of public servants, on the part of a great many newspaper readers, is strongly evidenced by the attitude of several of the leading dailies of New York City toward the present Board of Police Commissioners in their efforts to enforce the excise law of the State in the metropolis. It is only fair to the intelligence of the editors of these journals, to assume that they are presuming on the gullibility of their readers—in other words, that they know that their attacks on the President of the Police Board, and the insinuation that he is responsible for the effects of the honest enforcement of police legislation, are unfair. There seems to be in many minds no understanding of the difference in the matter of responsibility for legislation between the lawmaker, whose vote is an exercise of personal judgment, and the ministerial officer, whose purely administrative duty under the provisions of the law itself, is to enforce what the legislator causes to become law. The proposition that a law enacted very recently, forbidding certain acts in the plainest terms, and conferring no discretionary powers whatever upon anybody, may be enforced or not by an administrative officer, according to his own discretion in each particular case, is seriously advanced, and evidently accepted by many. This is termed a "liberal construction" of the excise law. It is, of course, nothing short of the abolition of the law. It makes a dummy of the legislator, and a dictator of the executive officer. It would

appear that a considerable number of the citizens of the great city are in need of instruction in the elements of civic economy. It is a striking commentary on the character of the modern legislator, that many of those who voted for the law in question have recently stated that had they supposed that it would be so "strictly construed," they would not have favored it—as if the construction of a law would permit its absolute negation.

* * *

MR. W. T. STEAD contributes an article to the September issue of *The Contemporary Review* of more than passing interest to American citizens. Under the title of "Jingoism in America," Mr. Stead takes the opportunity to state his views in regard to the disputed boundary between British Guiana and Venezuela, and upon the right of the United States to demand arbitration in the upholding of the Monroe doctrine. He illustrates public opinion in the United States by quoting an excerpt from the Fourth of July oration of ex-Governor James E. Campbell of Ohio, delivered before the Tammany Society in New York, and parts of communications received from ex-Senator Ingalls and Senator Lodge, in reply to a list of questions propounded by *The Chicago Times-Herald*. He dismisses the "frothy menaces" of ex-Governor Campbell, and other "Jingos" who would uphold the Monroe doctrine, with small comment, but he asserts that he cannot disregard so lightly the opinions of Dr. Albert Shaw, who, he states, is not a Jingo. The reason for this would seem to be that Dr. Shaw is the editor of *The Review of Reviews* (Mr. Stead's magazine), which he assures us is "the most widely circulated periodical dealing with current political and social problems in the United States of America." Dr. Shaw seems to have promulgated the doctrine that the British not only should cease from extending their territory in South America, but should prepare to withdraw altogether; upon what grounds is not stated, but the question is easily disposed of by the assertion that leaving the disputed territory out of account, the British have as much right to Guiana as we have to New York State. What is of real interest is Mr. Stead's statement of the boundary dispute, and although he admits that it is hard to state the full strength of the British case, owing to the absence of any published papers or blue book on the question, still, it must be admitted that without authorities Mr. Stead makes out a good *prima facie* case. He claims that there never has been a question of extending British territory beyond the limits "laid down as far back as 1797," and, therefore, as this is a

period precedent to the promulgation of the Monroe doctrine, it cannot apply here, as the Monroe doctrine starts from the *status quo*. The boundary of 1797 is claimed by the British, as successors of the Dutch, but upon the justice of the claims of the Dutch little is said. From the entire case it would appear that Great Britain had acted in an exceedingly handsome manner towards Venezuela, making concessions "in a spirit of peace and good neighborliness," in accordance with her usual modest foreign policy. In fact, the conclusion is reached, that far from opposing the aggressions of the British in Venezuela, we should be more "closely drawn to the British colony of Guiana." The argument that the Monroe doctrine has no application, is of course untenable, because the boundary dispute is still unsettled, and the question of extension of British dominion is necessarily involved. If the British have such uncontrovertible claims to the territory in dispute, they should be the last to shrink from arbitration. It seems, at first sight, a little odd that we should have been so grossly misled as to the whole matter as Mr. Stead maintains, but we are not yet quite convinced that the British are not attempting under the guise of a disputed boundary, which they refuse to arbitrate, to dismember a South American republic, in contemptuous disregard of the Monroe doctrine. It has become a question whether or not the doctrine has any force which the nations of Europe are bound to recognize.

* * *

DURING the Fall term Prof. William C. Robinson will take no part in the work of instruction in the Law School. His plans for the future are not definitely made, but it is hoped that he will be able to teach some branches during the Winter and Spring terms. Prof. Robinson has been long and prominently identified with the work of legal instruction, both in the law and academic departments of the University. As an instructor and as a writer on legal subjects he enjoys a wide reputation. Members of the senior and graduate classes of the law school who have become acquainted with Prof. Robinson during the earlier years of their course, will much regret his absence, and hope that it may not long continue.

* * *

To the incoming Junior class the LAW JOURNAL extends welcome and congratulation. The class begins its existence under conditions far more favorable than those which have in previous years confronted its predecessors. Since the beginning of the

year 1894-95, the school has moved from long outgrown and inconvenient quarters on the third floor of the County Court-house to the present building, which in point of convenience and adaptability to the purposes for which it was constructed, is probably not excelled by that of any professional school in the country. The fact that the class is the largest in the history of the school evidences an appreciation of these conveniences and of the increasing excellence of this department of the University.

* * *

THE JOURNAL notes with pleasure the addition to the faculty of Mr. William L. Bennett and Mr. James H. Webb, both of New Haven, and Mr. John Wurts of Jacksonville, Florida. Mr. Bennett and Mr. Webb will instruct the Seniors, the former in insurance, the latter in criminal law. Mr. Wurts will teach both classes the subject of real property. These gentlemen are lawyers of wide experience, and the school is to be congratulated in securing their services. A valuable course is offered in the Graduate Course by Prof. Arthur T. Hadley upon the economic problems of corporations. This subject, too seldom found upon law school curriculums, is of vast importance to lawyers who intend to practice corporation law. The course is eminently practical. It is needless to say that Prof. Hadley is one of the leading authorities upon this subject. Among the numerous lectures which are open to all students of the University is Professor Sumner's course upon the "Industrial Revolution of the Renaissance Period." The subject explains much of the development of the law of that period, and will be found very interesting and helpful to law students.

COMMENT.

In *Austin et al. v. Goodbar Shoe Co.*, the Supreme Court of Arkansas holds that the failure to file an attachment bond is a personal right of the defendant which cannot be asserted by a stranger to the suit. This decision follows *Banta v. Reynolds*, which reverses the former decisions in Kentucky. There is a statute in that State similar to one in Mississippi, which declares judgments in attachment, where no attachment bond has been filed, void. Previous to *Banta v. Reynolds* the statute had been strictly applied and such judgments set aside upon the motion of strangers to the suit. But in this case the court held that the expression in the statute making such judgments void was incautiously inserted, and the word "void" should be understood synonymously with "voidable"—that is "to be rendered void on pleading." Two supplementary decisions in South Carolina supporting *Banta v. Reynolds* may be noted. *Wagner v. Bookey* held that such failure to file bond was a jurisdictional error, and upon the motion of the defendant the judgment was set aside. While *Camberford v. Hall* held that a garnishee could not take advantage of any error or irregularities in the proceeding against the absent debtor. The filing of a bond is for the protection of the debtor. If it is not filed, the debtor may take advantage of the error or irregularity or he may waive it. A judgment made by a court of competent jurisdiction may be erroneous where such irregularity exists, but it is not void, and remains until arrested or reversed. It cannot be set aside except at the instance of the defendant.

* * *

In *Seeley v. Hicks et al.*, Executors (65 Conn.), the testator in a codicil to his will provided that should his grandson render such services to his estate as to satisfy a committee of three, the executors should pay him a certain sum. At the decease of the testator the grandson notified both the committee and the executors that he was ready to do whatever he could, and demanded an opportunity to render services. The executors refused to employ him, and as he had rendered no actual services the committee refused to give the executors a certificate of satisfaction. There were two conditions attached to the benefit conferred—one to faithfully devote his personal attention and services to the

estate, the other that such attention and services should sufficiently satisfy the committee. Quoting from *Redfield on Wills*, Vol. II., page 283, the Court said: "Where the condition is in the nature of a consideration for the concession, its performance will be regarded as intended to precede the vesting of any right, and so a condition precedent." The plaintiff, therefore, could take nothing until the conditions were fulfilled, or that done which in law, or within the expressed intent of the testator, was equivalent thereto. The general rule concerning conditions precedent is, "that conditions precedent must be fulfilled before the legacy vests, and the fact that the beneficiary is not at fault makes no difference." *Redfield on Wills*, Vol. II., page 284; *Johnson v. Warren*, 74 Mich. 491. To this rule there is this exception: "Where a testator confers a benefit upon a condition to be performed to or for the benefit of his estate, or to, or in favor of some third party and in his will manifests an intent to dispense with its performance when it is prevented by those having charge of his estate, or by such third party." *Page v. Frasier's Executors*, 14 Bush. 205. In such a case the benefit takes effect though the condition is not performed, because it is the intent of the testator. If, then, it was the duty of the executors to employ the plaintiff their conduct in refusing so to do prevented the fulfillment of the conditions. It was the intent of the testator that the executors give the plaintiff an opportunity to fulfill the conditions attached, for he left the power to defeat the gift in the plaintiff and the committee, and in no one else. The court rendered judgment that the committee perform the duty imposed upon it by the codicil just as if the plaintiff had actually rendered services to the estate.

* * *

The difference in effect of an absolute divorce and dissolution of a marriage upon the status of the parties has been illustrated in the interesting case of *State v. Duket*, 63 N. W. Rep. 83, decided by the Supreme Court of Wisconsin, which contains several complications. A statute of that State provides that sentence of imprisonment for life shall dissolve the marriage of the person sentenced, without any judgment of divorce or other legal process, and that no pardon shall restore the person to his conjugal rights. The constitution forbids the granting of any divorce by the legislature. One French had been sentenced to jail for life, and his wife took advantage of the statute and married again, while proceedings for a new trial were pending. The new trial was

granted, and the validity of the wife's marriage came in question. The lower court held it void, on the ground that the sentence had been illegal, and could not operate to change the status of the accused. The case was appealed, and the Supreme Court first considered the intent of the constitutional provision. They decided that the words must be construed with reference to the mischiefs at which they were aimed—the promiscuous granting of divorces by special acts—and that they did not limit the power of the legislature to enact just and proper laws affecting all persons alike in the matrimonial state. The law merely provided a general consequence attendant upon the life sentence of any married person, and did not authorize the granting of any divorce. The court held further that “the law was self-executing, and did not suspend the marriage relation, but extinguished it; so that the reversal of the sentence could not operate to restore the parties to their former relations, as in the case of reversal of a valid judgment of divorce.” This case suggests several questions which might arise under such a law. Suppose French to be acquitted on his second trial, and released. Would the injury caused him by the operation of the statute enable him to recover damages from the State for the loss of his wife's services? Or, in case his wife had preferred that the matrimonial relation between herself and her husband should continue after his imprisonment for life, it would appear unjust to dissolve it absolutely, against her will. The fault is plainly not with the court, but with the law, which is too sweeping. If a life sentence were merely made ground for an absolute divorce, it would be more consonant with justice and public policy.

* * *

The case of *Gwin v. Barton*, 6 How. 7, held that the Process Act of 1828, which required that the modes of procedure in the courts of the United States should conform as near as possible to the State law, did not adopt a State law inflicting penalties upon ministerial officers for failure to perform their duty. In *Leak Glove Mfg. Co. v. Needles*, 69 Fed. Rep. 68, the circuit court has decided that this doctrine has no effect where a State law has been adopted by act of Congress, for the government of the Indian Territory. The law has the same force in the Territory as an original act of Congress, without reference to its origin. It seems that in adopting the law for the Territory, the construction previously placed upon it by the State courts is to be followed, just as though it were the Federal courts which had passed upon it.

RECENT CASES.

Carriers—Termination of Carriage—Character of Liability.—*Norton et al. v. The Richard Winslow*, 67 Fed. Rep. 259 (Wis.). A quantity of grain was shipped from Chicago to Buffalo, at the close of the season, and the freight charges included storage in the vessel for the Winter. This was a custom in the ports of the Great Lakes, and saved the shipper elevator charges, besides securing the shipowner a cargo. The grain was damaged during the period of storage, in the Winter, and the evidence went to show that by the exercise of certain precautions the injury might have been avoided. The owner of the vessel was held liable only as a warehouseman, the court expressing its unwillingness to apply a different rule than the ordinary one of carrier's liability, in spite of the special contract.

Carriers—Negligence of Fellow Passengers.—*Gulf, C. & S. F. Ry. Co. v. Shields*, 29 S. W. Rep. 652 (Texas). A passenger, slightly intoxicated, enters the smoking car of a railroad train and places his baggage, which is in the form of an old tow sack filled with coffee grinders, scrap iron and a jug of alcohol, on the seat beside him, projecting slightly into the aisle. The motion of the train causes the sack to tumble out into the aisle of the car, breaking the jug and spilling the alcohol on the floor. As this flows along the aisle, another passenger, who is just lighting a cigar, throws a match in the way and the alcohol burns up to the ceiling of the car; a third passenger, with silk stockings and celluloid cuffs, has his feet, hand and eyebrows seriously scorched and sues the railroad company for damages. Held, that the contents of the sack being unknown to the conductor and the passenger's conduct not sufficiently boisterous to warrant his ejectment, it was not *actionable* negligence unless it was a proximate cause of the injury.

City Ordinance—Regulation of Pawnbrokers—Constitutional Law.—*City of St. Joseph v. Levin*, 31 S. W. Rep. 101 (Mo.). A city ordinance requiring pawnbrokers to keep a description of all property left with them, and of the persons leaving it, and show this to the police upon demand, is a proper police regulation. It does not conflict with Article II. Section 2, of the Constitution, which provides that the people shall be secure in their homes from unreasonable search at the hands of public officers.

Constitutional Law—Plea on Trial for Murder.—*Genz & State*, 31 Atl. Rep. 1037 (N. J.). A legislative act providing that pleas of guilty to an indictment for murder shall be disregarded, and a plea of not guilty substituted, and the case tried by jury, is constitutional. The defendant has not an inalienable right to plead guilty, as such a provision as this does not prejudice him and the common law procedure is subject to legislative control.

Contracts—Proof of Terms.—*Sherwood v. William H. Crane*, 33 N. Y. Sup. 16. The plaintiff claimed damages for breach of contract of employment by the defendant, a theatrical manager, under which she was to perform at the Star Theater (at a salary of sixty dollars per week), in a play called "Brother Jonathan," the performances of which were to commence in the latter part of February, 1893, and to run until June 1st. The defense was that she was not employed for any particular period, and that her employment was conditional upon her rehearsal of the part to the satisfaction of the author of the play and of the defendant. When the question in point is whether the employment of plaintiff as an actress was for the run of a particular play, or was for an entire season, evidence that the agent who engaged plaintiff engaged her for a particular play, stating: "This means a permanent thing for you in New York, from the opening until the balance of the season," and assured her that the play would not be a failure, and then stated the length of the season, is sufficient to sustain finding that employment was for the season.

Criminal Law—Disturbing Public Worship.—*Winnard v. State*, 30 S. W. Rep. 555 (Texas). A man furnished some boys with the means of disturbing public worship in a church, and then absented himself, before the disturbance took place. It was held that he was a principal in the offense, although he had cautioned the boys to wait till after the services were over.

Damages—When Not Excessive.—*Erickson v. Brooklyn Heights Ry. Co.*, 32 N. Y. Supp. 915. The plaintiff, a healthy and robust married woman, suffered injuries on a street railway which resulted in the impairment of her hearing, the loss of a leg, and the disabling of a right arm. Held, that a verdict of \$23,000 was not excessive, and that such a sum would not more than compensate her for the change in her condition.

Duress—Mortgage of Wife's Land.—*Russell v. Durham et al.*, 29 S. W. Rep. 635 (Ky.). It is not held to be duress when a wife is induced by the importunities of her husband and the threats of

criminal prosecution by his sureties to execute a mortgage on her own property, and a foreclosure sale of such property under an execution will not be set aside on that ground. It is but natural that she would sacrifice anything to save her husband from danger of imprisonment and disgrace, and this outweighs the fact that she is so unfortunate as to lose her property thus.

Exemption from Taxation—Railroad Property.—*State v. Mayor of Jersey City et al.*, 31 Atl. Rep. 1020 (N. J.). The commissioners of adjustment of Jersey City imposed a local tax on certain railroad property which had been exempted from general taxation by a legislative act so long as it was occupied for railroad and shipping purposes. It was decided that the State had accepted the payment of a full consideration from its grantee when the land was originally conveyed to the railroad companies, and neither it nor its political subdivisions could repudiate any of the terms of the contract which inured to the benefit of the latter. The burden of proof rested upon the city authorities to show that the land had been used for other than the specified purposes.

Fair Grounds—Leasing for Gambling Purposes.—*State v. Darroch*, 40 N. E. Rep. 639 (Ind.). The appellee was charged with violating section 2174, Rev. Statutes, forbidding the officers and managers of agricultural societies from renting, leasing, or donating their grounds to be used for gambling purposes. The court held that the appellee, acting as a director of such a society and unlawfully renting a portion of the grounds for the purpose of carrying on a game of chance with dice, was liable for a violation of this statute.

Homestead—Intention—Evidence.—*Gallagher et al. v. Keller*, 29 S. W. Rep. 647 (Ind.). Appellant bought a lot and made some improvements on it, but did not begin to build a house on it until after the lot had been sold under execution for a judgment rendered against the owner in favor of the appellee. The facts that he built the house and moved into it after the lot was sold under execution must be accepted as evidence tending to establish appellant's intention of making the lot his homestead at the time of its purchase, and of the continuation of such intentions from the time he purchased it until he actually occupied it as his home.

Injury from Defective Street—Liability of City.—*Yeager v. City of Bluefield*, 21 S. E. Rep. 752 (W. Va.). A city does not insure

against accidents on its streets, and if they are in a reasonably safe condition for ordinary travel, is not liable for injuries to foot passengers.

Life Insurance—False Statement—Effect on Policy.—*Bridge v. National Life Assn.*, 33 N. Y. Supp. 553. A false statement by an insured person, made under a mistake as to his legal obligations, does not avoid a policy regularly in force at the time the statement was made.

Mortgage—Effect of Tender—Lien.—*Parker v. Beasley*, 21 S. E. Rep. 955 (N. C.). One whose land was advertised for sale under a mortgage made a legal tender of the amount due, with interest and costs, to the creditor's attorney. The latter refused to accept it, unless his fees were also paid, and as this was not done, sold the land. Held, that a tender after maturity stops interest from the time of the tender, but does not discharge the mortgage lien, and the judgment becomes a lien upon the land.

Mortgage—Penal Provision.—*Kreetz v. Robbins*, 40 Pac. Rep. 415 (Wash.). A provision in a note payable after five years, with interest at 7 per cent. per annum, that on failure to pay interest when due it shall be increased to 12 per cent. per annum, and be computed on the principal from the date of the note, is a penalty, and courts of equity will not enforce it.

Receivers—Selection—Officer of Corporation.—*Olmstead v. Distilling and Cattle Feeding Co.*, 67 Fed. Rep. 24. The Distilling and Cattle Feeding Co. became insolvent, and receivers were appointed upon application, one of whom was the president of the company. The latter had speculated in the company's stock, and was at the time of the appointment short a number of shares on the New York Stock Exchange. This petition was brought by other stockholders to substitute another receiver in his place, and was granted by the court, which said that while an officer of a corporation was not ineligible for such an appointment, he must be a strictly disinterested party. In this case the president's interests as an officer were directly opposed to his private interests, and under such circumstances the acceptance of a receivership was held an imposition on the stockholders.

Religious Societies—Review by Civil Courts.—*Pounder v. Ash*, 63 N. W. Rep. 48 (Neb.). The civil courts have no jurisdiction in purely ecclesiastical matters, and will not review the proceedings

of a church tribunal in a case relating solely to church discipline. A judgment of the highest tribunal of a religious denomination, deposing a clergyman from the ministry, will be recognized, and enforced by an injunction forbidding him to act further in that capacity in his former parish.

Review of Appeal—Admission.—*Alderman v. Savage*, 40 N. E. Rep. 639 (Ind.). Appellant entered into an agreement with appellee, in which the latter undertook to insert a certain advertisement in thirteen continuous editions of a weekly newspaper. In a suit for the contract price, the admission of appellant that the "ad" was printed in each of the papers for thirteen successive weeks, although he denied that it was inserted in *all* the issues of each paper, was held sufficient to warrant a verdict for appellee.

Shipping—Bill of Lading—Excepted Perils.—*Brauer v. Campania Navigacion La Flecha*, 66 Fed. Rep. 776. A bill of lading exempted a carrier by sea from liability for accidents to cargo occasioned by the negligence or error of judgment of the shipmaster. Held, that this did not relieve him from liability for cargo thrown overboard during a severe storm, when it appeared that the sacrifice was not necessary to the preservation of other property or the ultimate safety of the ship.

Statute of Frauds—Sale of Goods—Receipt.—*Moore v. Hays*, 40 N. E. Rep. 638 (Ind.). Appellant sells corn to C on an oral contract and at the same time orders him to take it away. C directs appellee to remove the corn from appellant's pen and in turn is sued for its value. Mere words would not constitute a delivery, but here there was actual receipt of the goods by the purchaser, or by another under his direction, which amounts to the same thing, and the agent of the purchaser is not liable to the seller for the value of the corn, his receipt of the goods having the effect of taking the contract of sale out of the statute of frauds.

Tenancy from Year to Year—How Created—Tenant Holding Over.—*Kleespies v. McKenzie*, 40 N. E. Rep. 648 (Ind.). Where a tenant under a lease for years holds over, and the landlord thereafter accepts or demands rent, a tenancy from year to year is created, which may be terminated by ten day's written notice to quit, in case of default in payment of rent. It is on the same footing with tenancies established by the occupancy of the tenant

on the one hand, and the consent of the landlord on the other, without any express agreement as to duration.

Trial—Instructions—Construction of Charge as a Whole.—*Butler et al. v. Machen*, 65 Fed. Rep. 901. In this case the presiding judge, in charging the jury, gave strictly correct instructions as to the rule of preponderance of evidence, but in attempting to make that rule more intelligible to the jury, some of the disconnected sentences of the charge, if taken alone, would seem to indicate that they might substitute their own opinion for the evidence produced at the trial. Held, that there was no error if these sentences, when read with the remainder of the charge, would bear no such meaning.

Trusts—Accounting by Trustee—Interlocutory Judgment.—*Rogers et al. v. New York & T. Land Co. Limited et al.*, 33 N. Y. Sup. 840. The court has the power to reserve the question as to whether certain expenses which are claimed as a charge shall be allowed or not, until the referee's report comes in, and the court be fully informed in regard to all the facts and circumstances of such accounts. An interlocutory judgment in an action against trustees, which provides for this, is sufficient in form, though it does not decide whether or not any of the expenses should be allowed.

Wills—Construction—Description of Legatees.—*In re Benson's Estate*. Appeal of *Davies et al.*, 32 Atl. Rep. 654. The only difficulty in this case is to determine what the testator meant by the expression "my nephews who may read law," and whether the court below was right in holding that one who reads law books "casually, for amusement or in a desultory manner," as the testimony tends to show of the nephew in question, was not entitled to a distributive share of the testator's law library. Held, that this was a bequest to such of testator's nephews as had taken up the study of law with the purpose of being admitted to the bar and practicing the profession, or as had already been admitted and were practicing; but did not include one who, though registered as a student, and having read law for a year, had abandoned all intention of being admitted.

BOOK NOTICES.

American Electrical Cases. A collection of all the Important Cases (excepting patent cases) decided in the State and Federal Courts of the United States from 1873 on subjects relating to the Telegraph, the Telephone, Electric Light and Power, and other Practical uses of Electricity, with Annotations. By Wm. W. Morrell. Vol. III., 1889-1892. Price, \$6.00. Matthew Bender, Albany, 1895.

It is with pleasure that we acknowledge the receipt of this third volume of the series in Electrical Cases. The arrangement by States has been followed and a valuable index placed in the back where similar cases are grouped together under black line headings, with references to pages of the book. The lawyer is thus enabled to quickly collate all the cases within the scope of this volume. A comparison with the preceding volume is interesting from the light it throws on the increasing uses of electricity. Volume II., covering the period from 1886 to 1889, contains two cases on the subject of interference of electrical currents as compared with ten cases in volume three, which covers a period of equal length. Volume II. has six cases on the rights of abutting owners, as affected by the maintenance of electrical apparatus in the highways, while volume III. contains eighteen, the increasing number being doubtless due to the recent multiplication of wires and posts consequent upon the general adoption of electric railways. There are eighteen cases concerning electric light companies, twenty concerning telephone companies and twenty-five, or nearly one-fourth of the whole number, concerning electric railways. The last two cases give the decisions of the New York Court of Appeals and United States Supreme Court on the constitutionality of the New York law requiring electrocution as the penalty for capital offenses. The same method of notes referring to cases supporting or denying the doctrine advanced is observed as in the former volumes. This series of Electrical Cases is an indispensable aid to every attorney whose practice includes the uses of electricity.

A Treatise on the Law of Real Property. By Darius H. Pingrey, LL.D., Author of a "Treatise on Chattel Mortgages," "Real Estate Mortgages," and Contributing Editor of the American

and English Encyclopedia of Law. Two volumes. Sheep. Pages ccvi and 1650. Price \$12.00. H. B. Parsons, Albany, 1895.

In these volumes of Mr. Pingrey we have a clear and reasonably comprehensive statement of the principles underlying the law of real property. The work is thoroughly modern and practical. The recent modification of the ancient doctrine of the common law that the owner of land possessed not only everything erected upon its surface, but also everything beneath it, is forcibly presented by reference to the comparatively modern custom of creating as many separate fee-simple estates in buildings, as there are floors in these buildings, and dividing the land into as many separate estates as there are intervening strata of oils, minerals, gases, etc., beneath its surface. In his treatment of the legal character of these estates, the tenure by which they are held, the time of their coming into enjoyment, and the title by which they may be acquired, the author is especially clear. He not only presents succinctly and forcibly the accepted doctrines pertaining to them, but also touches with sufficient fullness upon the logical and historical development of these doctrines. By this method of treatment, he materially aids the reader in understanding the reason underlying doctrines which have frequently seemed perplexing, unreasonable and arbitrary. A noteworthy feature of the work is the especially strong discussion of mortgages, their nature and classification, and the rights of the contracting parties before and after default. The work throughout bears evidence of careful preparation and accuracy of statement. We regard it as a valuable addition to the literature on this subject, and one which will prove helpful to practitioners and students. We commend the publisher on the tasteful appearance of the volumes, their thorough indexing, clear typography and substantial binding.

Hand-book of International Law. By Captain Edwin F. Glenn, Acting Judge Advocate, United States Army. Sheep, 478 pages. Price \$3.75. West Publishing Co., St. Paul, 1895.

This work is not intended as a substitute for other exhaustive works which treat of this subject, but rather as a student's manual from which the principle of international law can be quickly and easily grasped. With this object in view the author has made numerous references to more extended works, and has also cited many cases which illustrate clearly and concisely the principle enunciated. In spite of his reference to other works, Mr. Glenn has shown no small amount of originality, both in the method of arrangement and in the discussion of the subject-mat-

ter. He very wisely condemns an attempt to state propositions in an original way merely for the purpose of originality, and yet in many instances he has proved himself to be a logical reasoner on uncertain questions of international law. In its definitions the work follows the Hornbook system, stating in black type the author's definition and amplifying this at length in the ordinary type, so that the student can see the general principles at a glance, and also avail himself of the discussions and cases given subsequently. The division into twenty-four chapters is entirely the author's own, each chapter treating of a distinct subject. Fifty authorities are cited in the work, so that it forms an epitome of international law for the practitioner as well as a hand-book for the student. The legal profession cannot fail to welcome this number of the Hornbook Series.

Hand-book of the Law of Sales. By Francis B. Tiffany. Sheep, 348 pages. West Publishing Co., St. Paul, 1895.

This addition to the Hornbook Series cannot fail to take as important a place in the lawyer's library as its predecessors. The object of the book is to give a concrete exposition of the general principles relating to the law of the sale of personal property, and it follows in the main the arrangement of Benjamin. The author has divided the subject into ten chapters, in the first two of which he treats of the formation of the contract as regards the capacity and assent of the parties, the thing sold, the price, and the operation of the Statute of Frauds. The third and fourth chapters treat of the effect of the contract in passing the property whether it be in the sale of chattels specific, or not specific. Mistake, failure of consideration, fraud and illegality are discussed exhaustively in chapters five and six. Under "Conditions and Warranties," the author has analyzed the subjects of conditional sales, and express and implied warranties both of title and quality. Chapter eight on the performance of contract is an exposition of the essentials of delivery, acceptance and payment in the sale of goods, while the right of action for breach of contract forms the subject of the last chapter. The work has all the admirable features of the Hornbook Series, and cannot be too warmly recommended either as a text or reference book.

MAGAZINE NOTICES.

The Green Bag, July, 1895.

Personal Recollections of Chief Justice Chase (with portrait)	Eugene L. Didier
A few Reasons why it is not Wise to give the Ballot to Women, - - - - -	Mary Wick Saxe
The Police of Paris.	
Legal Entomology, - - - - -	R. Vashon Rogers
The English Law Courts: II. (illustrated).	
A Ghost of Nisi Prius: II., - - - - -	A. Oakey Hall
The Lawyer's Easy Chair, - - - - -	Irving Browne

August, 1895.

Roger B. Taney (with portrait), - - - - -	Edw. S. Taney
Legal Reminiscences: X., - - - - -	L. E. Chittenden
Moral Insanity as a Defense to Crimes, - - - - -	Frank B. Livingstone
Thackeray's Legal Career.	
Tanghin, or the Poison Ordeal of Madagascar.	
The English Law Courts: III. (illustrated).	
Exterritoriality of Orientals in England.	
The Lawyer's Easy Chair, - - - - -	Irving Browne

September, 1895.

John Barber Minor (with portrait), - - - - -	Thomas J. Michie
London Police Courts, - - - - -	William Holloway
Imprisonment for Debt, - - - - -	Benj. F. Washer
The English Law Courts: IV., The Chancery Division.	
When Might was Right, - - - - -	Archibald R. Watson
The Lawyer's Easy Chair.	

Albany Law Journal, 1895.

July 6. The Appellate Division or Divisions of the Supreme Court, - - - - -	Theodore F. C. Demarest
July 13. The Work of the Bar Association, - - - - -	J. Newton Fiero
July 20. Civil Service Law, - - - - -	D. Cady Herrick
July 27. Legal Education and Admission to the Bar,	George Wharton Pepper
Aug. 3. Stare Decisis, - - - - -	Walter J. Hover
Aug. 10. Operation of Foreign General Assignments as Affected by a Conflict of Laws, - - - - -	Edw. L. Randall
Aug. 17. The Law Relating to Boycotts, - - - - -	Judge Dillon
Aug. 24. Statutory Construction, - - - - -	Hon. F. S. Monnett
Aug. 31. Civil Jurisdiction over Military Reservations, - - - - -	J. S. Parke
Sept. 7. Law Reporting in the United States, - - - - -	Frank C. Smith

<i>Sept. 14.</i>	Roman Jurisprudence, - - -	Boyd Winchester
<i>Sept. 21.</i>	Westchester Annexation Cases, - -	William D. Guthrie
<i>Sept. 28.</i>	Liability for Loss by Fire, - - -	Junius Parker
	Some Notable Scotch Lawyers, - -	Henry Cockburn

Central Law Journal.

<i>June 21.</i>	Provisions in a Mortgage that the whole Debt may be declared Due upon a Default in Payment of an Installment, - - -	Samuel Maxwell
<i>June 28.</i>	Civil Service Law, - - -	D. Cady Herrick
<i>July 5.</i>	Independent Contractors and the Liability for their Negligence, - - -	G. W. Derwalt
<i>July 12.</i>	The Payment of a Forged Bill of Exchange by the Drawee, - - -	W. W. Thornton
<i>July 19.</i>	Ratification by Corporation of Unauthorized Act of Agent, - - -	D. R. N. Blackburn
<i>July 26.</i>	Equitable Conversion, - - -	William L. Murphy, Jr.
<i>Aug. 2.</i>	Photographs as Evidence, - - -	George Lawyer
<i>Aug. 9.</i>	Does an Alderman duly elected and qualified Vacate his Office by Removal from his Ward, George B. Stewart	
<i>Aug. 16.</i>	"Open Court," - - -	Wm. A. McNeill
<i>Aug. 23.</i>	State Legislation Against Foreign Corporations, - - -	W. D. Leeper
<i>Aug. 30.</i>	Debt, Note and Mortgages as Independent Entities, - - -	C. A. Bucknam
<i>Sept. 6.</i>	Compensation for Legal Services, - - -	T. A. Polleys
<i>Sept. 13.</i>	Sale of Real Estate, - - -	Wm. L. Murfree, Jr.
<i>Sept. 20.</i>	Contracts of Service Terminable by Notice, - - -	Samuel C. Williams

American Law Review, July and August, 1895.

Agreements not to be Performed Within a Year, - - -	Edmund H. Bennett
The Railroad Strikers' Case in California, - - -	Marshall B. Woodworth
Mistakes on the Subject of Notice to corporations, - - -	Seymour D. Thompson
Neutrals and the Madagascar Expedition, - - -	M. J. Farrelly
The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress, - - -	Sylvester Pennoyer
Patents for Methods: The Case of Risdon Iron and Locomotive Works <i>v.</i> Medart <i>et al.</i> , - - -	Walter Forwood Rogers

September and October, 1895.

Criticisms of the Federal Judiciary, - - -	William H. Taft
The Legal Aspect of the Telegraph and Telephone: Essential Parts of an Efficient Postal Service, - - -	Walter Clark
A Prescription for Anarchists, - - -	E. M. Winston
Modern Law Treatises: What They Are and What They Should Be, - - -	Frederick H. Bacon
Roundell Palmer, Earl of Selborne, - - -	George H. Knott
The Origin of the Supreme Judicial Power in the Federal Constitution, - - -	Robert L. Fowler

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THE DOCTRINE OF THE UNITED STATES SUPREME COURT OF PROPERTY AFFECTED BY A PUBLIC INTEREST, AND ITS TENDENCIES.*

JOHN A. PORTER PRIZE ESSAY.

The student of law who undertakes to examine the decision of the Supreme Court of the United States in *Munn v. Illinois*, 94 U. S. 113, and to discuss its tendencies, must possess more than the ordinary amount of that assurance which is supposed to accompany ignorance if he does not feel hesitation in analyzing and diffidence in expressing his conclusions upon this difficult and important question.

His examination of the authorities to which he is accustomed to turn for sure guidance in complicated and far-reaching matters leaves him in doubt whether language of cautious generality should be interpreted as giving a hesitating support to, or as veiling a respectful dissent from, the principles upon which this decision is based. For the questions involved are much more than mere legal ones turning upon the application of generally conceded legal principles, or the construction of doubtful phrases. They put in issue the deep underlying matters of political economy which are agitating the whole civilized world of our day.

The gist of the decision is an endeavor to give to the indefinite economic ideas of the present time the support of definite legal principles; or, in other words, to attempt to give to these definite legal principles a force and extent which, in the minds of many experienced jurists, they cannot be made legitimately to sustain. Hence the doubt and dissent with which the decision has been received. And in face of this uncertainty of the

**Munn v. Illinois*, Etc.

leaders of the legal profession, the student must feel that, in entering upon a discussion of this subject, he is affording a new illustration of the saying that fools step in where angels fear to tread.

To begin with, it will be well to recall briefly the circumstances of the case.

Munn, a citizen of Illinois, owned and conducted a grain elevator in Chicago. The Constitution of the State having declared the business to be a public one, the Legislature passed a statute for its regulation. This statute required any one in that business to procure a license and give a bond; it also fixed a penalty for failure to comply with these regulations, and required publication of the rate of charges for each ensuing year, and established a maximum charge.

Munn, whose business was in active operation before the passage of this statute, failed to comply with its regulations, and was fined for his failure. He appealed to the Supreme Court of Illinois against the conviction, and, the conviction being affirmed, he sued out a writ of error in the Supreme Court of the United States.

His claim was that the sections of the statute containing the above-mentioned regulations were unconstitutional and void, and that they were repugnant to the Fourteenth Amendment to the Constitution of the United States, which ordains that "No State shall deprive any person of life, liberty, or property, without due process of law."

The question thus squarely presented for the decision of the Supreme Court of the United States was this: Can the Legislature of a State, putting in force a declaration in its constitution that a certain business, heretofore a private one, is a public one and subject to legislative control, compel the owner of such a business, established before the adoption of the State Constitution, to submit to have his charges regulated by the Legislature? Did the Fourteenth Amendment afford him protection in these circumstances?

The majority of the Supreme Court decided that the statute in question was constitutional, and that it did not violate the Fourteenth Amendment.

The opinion delivered by Chief Justice Waite argued as follows: The provision against deprivation as a limitation on the power of States is old; it is found in Magna Charta, and substantially in nearly all the State Constitutions. It was introduced into the Constitution of the United States by the Fifth Amend-

ment, and by the Fourteenth, as a guarantee against State encroachment. A member of a body politic necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. This does not confer upon the whole people power to control rights exclusively private, but it does authorize laws requiring each citizen to so use his property as not unnecessarily to injure another. This is the very essence of government, and is the source of the Police Powers. Under these powers the Government regulates the manner of using property when necessary to do so for the public good. Under this power it has always been customary in England and in this country to fix rates of charges for ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc. This has never been said to come within the constitutional prohibition against interference with private property. Hence it is apparent that down to the adoption of the Fourteenth Amendment it was not supposed that statutes regulating the use or even the price of the use of private property necessarily (although they may sometimes) deprived an owner without due process of law.

As to the principles upon which the power of regulating rests, the opinion argues that the common law, whence came the right which the Constitution protects, rules that when private property is "affected with a public interest, it ceases to be *juris privati* only," as was said by Lord Hale in *De Portibus Maris*, 1 Harg. Law Tracts, 78.

The Court then continues: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

The opinion then argues that the grain elevator business in Chicago was a virtual monopoly, and was, therefore, by that, clothed with a public interest and ceased to be *juris privati*. "It might not have been made so by the statute of Illinois, but it was made so by the facts." It was immaterial that no precedent could be found for a statute precisely like this, as the facts showed a new development of commercial progress, and the statute simply extends the law to meet it. Nor did it matter that the

owner's business was started before the regulations were adopted, as he was from the beginning subject to the power of the body politic to require him to conform to regulations established for the public good.

As to an owner's right to a reasonable compensation, and as to whether it is for the Legislature or the judiciary to decide as to reasonableness, the opinion says that in common law countries it is customary for the Legislature to declare a maximum, beyond which any charge made would be unreasonable. In private contracts the reasonableness is judicially determined, because the Legislature has no control over such contracts.

"The controlling fact is the power to regulate at all, and where that exists the right to establish a maximum of charge, as one of the means of regulation, is implied."

To sum up the material points of the above argument, it would appear:

That the admitted limitation of the power of deprivation by the State is itself limited by the duty of the citizen, as a member of the body politic, to so use his property as not unnecessarily to injure others. This duty of the citizen the State has a right to enforce by the Police Powers, and such exercise, in certain specified cases, has been unresisted from all time.

That this power of regulation is derived from the common law, and is properly exercised over private property when affected with a public interest.

That such public interest does arise whenever one devotes his property to a use in which the public has an interest.

That this business was a virtual monopoly, and this notwithstanding its vast importance, and, therefore, it was clothed with a public interest, ceased to be *juris privati* only, and became subject to regulation by the public.

I proceed now to examine this argument and point out the objections that have been made to it.

The first important matter for consideration is the Police Power of the State.

Vague and almost impossible of definition as are the Police Powers of a State, it may be taken as established that such a use of one's property as unnecessarily to injure others can always be prevented by State interference. "The Police Power of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of

good manners and good neighborhood which are calculated to prevent a conflict of rights, and to ensure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others."¹

It is needless as it would be tedious to multiply quotations from the numerous cases in which Police Powers have been defined, or, rather, described, but it may be remarked in passing that many of them emphasize the distinction between these powers and that of eminent domain, which latter can only be exercised on condition of providing compensation therefor.

On the other hand, the Police Power extends, in cases to which it is applicable, to the absolute destruction of private property, without providing any compensation at all.

"The acknowledged Police Power of a State extends often to the destruction of property; a nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed."²

But a reference to some of the principal cases in which the Police Power has been exercised, and upheld by the Supreme Court, will show that there had been some element in each case which afforded at least an ostensible reason for the interference of the State, on the ground that the health, morals, or safety of the public were affected.

Thus, in the Slaughter House Cases,³ an exclusive privilege of slaughtering cattle within an area of more than one thousand miles was sustained. It can be imagined that regulations regarding the slaughtering of animals might be necessary for the public health. This decision was followed in the case of New Orleans Gas Company *v.* Louisiana Light Co.,⁴ which granted exclusive privileges for lighting a city, and this case was distinguished from *Stone v. Mississippi*⁵ and *Butchers' Union v. Crescent City Co.*,⁶ on the ground that the contract was not in any legal sense to the prejudice of the public health or safety.

In *Patterson v. Kentucky*,⁷ a State statute was held valid which imposed a penalty for selling patented oils of a dangerously inflammable nature.

¹ Cooley's Constitutional Limitations (6th Ed.) 704.

² McLean, J., in *The License Cases*, 5 How. 504.

³ 16 Wall. 36.

⁴ 115 U. S. 650.

⁵ 101 U. S. 814.

⁶ 111 U. S. 746.

⁷ 97 U. S. 501.

In *Fertilizing Co. v. Hyde Park*,⁸ the Court sustained an ordinance which destroyed the business of the Fertilizing Company, it having become a nuisance, and dangerous to the health of the inhabitants.

In *Barbier v. Connolly*⁹ and *Soon Hing v. Crowley*¹⁰ ordinances which regulated the hours of work in laundries were sustained.

The above cases are instances of the exercise of the Police Power which, though not unanimously conceded, seem capable of being brought within the scope of the power.

But some later cases appear to have materially extended the application of the Police Power.

Thus in *Powell v. Penn.*,¹¹ the Supreme Court upheld the validity of a statute of Pennsylvania prohibiting the sale of oleomargarine, although there was no evidence of its injurious effect on the health of the people. Justice Harlan says in his opinion¹²: "And as it does not appear upon the face of the statute, or from any facts of which the Court must take judicial cognizance, that it infringes rights secured by fundamental law, the legislative determination is conclusive upon the Court."

This decision has met with much disapproval. Justice Field, in his dissenting opinion,¹³ says:

"Here the article was healthy and nutritious, in no respect injuriously affecting the health of anyone. It was manufactured pursuant to the laws of the State. I do not, therefore, think that the State could forbid its sale or use; clearly not without compensation to its owner. Regulations of its sale and restraints against its improper use undoubtedly could be made, as they may be made with respect to all kinds of property; but the prohibition of its use and sale is nothing less than confiscation. * * * I have no doubt of the power of the State to regulate its sale when such regulation does not amount to the destruction of the right of property in it. The right of property in an article involves the right to sell and dispose of such article, as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such

⁸ 97 U. S. 659.

⁹ 113 U. S. 31.

¹⁰ 113 U. S. 703.

¹¹ 127 U. S. 678.

¹² p. 685.

¹³ p. 699.

arbitrary legislation by any State the Fourteenth Amendment affords protection. But the prohibition of sale in any way or for any use is quite a different thing from a regulation of the sale or use, so as to protect the health and morals of the community. The fault which I find with the opinion of the Court on this head is that it ignores the distinction between regulation and prohibition."

The Court of Appeals of New York in *People v. Marx*¹⁴, was called upon to decide the constitutionality of a State statute of New York involving the same question as that in *Powell v. Pennsylvania*, and it came to the conclusion that the statute was unconstitutional. Judge Dillon, commenting on the conflicting decisions as above, says:¹⁵

"We cannot refrain from expressing our full concurrence in the views and conclusions of the Court of Appeals of New York in *People v. Marx*. It will not escape observation that the Court of Appeals of New York and the Supreme Court of Pennsylvania reached opposite conclusions on a question relating so vitally to the natural, inalienable, and primordial rights of the citizen. The judgment of the Supreme Court of Pennsylvania sustaining the Act of 1885, was affirmed by the Supreme Court of the United States, and on like grounds if the New York statute (which was in judgment in the case of *People v. Marx*) had been before the Supreme Court of the United States its validity would have been upheld, unless the Supreme Court had followed the judgment of the Court of Appeals. We have at all events that which is regarded as a fundamental right in New York considered not to be such in Pennsylvania. * * * * We cannot but express our regret that the Constitutions of the States or that of the United States, admits of a construction that it is competent for a State Legislature to suppress (instead of regulating) under fine and imprisonment the business of manufacturing and selling a harmless and even wholesome article, if the legislature chooses to affirm, contrary to the fact, that the public health or public policy requires such suppression. The record of the conviction of *Powell* for selling, without any deception, a healthful and nutritious article of food, makes one's blood tingle."

In the same year, 1887, the case of *Mugler v. Kansas*, came before the Supreme Court of the United States¹⁶. *Mugler* was

¹⁴ 99 N. Y. 377.

¹⁵ Dillon on Mun. Corps., p. 211, Note 1.

¹⁶ 123 U. S. 623.

the owner of a brewery in Knasas, and the Legislature of that State, enforcing a constitutional restriction upon the manufacture and sale of intoxicating liquors, passed a statute which practically destroyed Mugler's business, and rendered his property worthless. Under it he had been compelled to submit to the destruction of liquors already manufactured, and of bottles, glasses and other utensils of his trade.

The majority of the Court upheld the validity of the Kansas statute, even to its affecting property engaged in the business when a lawful one. Justice Harlan says on this point:¹⁷

"This is not depriving the citizen of his property without due process of law, and that interpretation of the 14th Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their power for the protection of the safety, health, or morals of the community." And further:¹⁸ "The principle that no person shall be deprived of life, liberty or property without due process of law * * * has never been regarded as incompatible with the principle equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." And again:¹⁹ "The exercise of the Police Power by the destruction of property which is itself a public nuisance; or the prohibition of its use in a particular way whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case a nuisance only is abated, in the other unoffending property is taken away from an innocent owner."

This decision was affirmed and followed on a similar state of facts in *Kidd v. Pierson*.²⁰

Commenting upon statutes of this kind, Judge Cooley says:²¹

"Perhaps there is no instance in which the power of the Legislature to make such regulations as may destroy the value of property, without compensation to the owner appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the Legislature then steps in and by

¹⁷ 123 U. S. 664.

¹⁸ p. 665.

¹⁹ p. 669.

²⁰ 128 U. S. 1.

²¹ Cooley's Const. Limit. 719.

an enactment based on general reasons of public utility annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that, for the purposes of sale, becomes a criminal offense; and, without any change whatever in his own conduct or employment, the merchant of yesterday becomes the criminal of today, and the very building in which he lives and conducts the business which to that moment was lawful becomes the subject of legal proceedings, if the statute shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit; but, whether satisfactory or not, the reasons address themselves exclusively to the legislative wisdom."

It is submitted that the cases last cited differ in principle from the earlier decisions in that the injury to the public, by which the exercise of the Police Power is justified, is one more of opinion than fact, and in this distinction lies the root of the dissent to them. All opinions would agree in principle that the indiscriminate slaughter of animals might be gravely prejudicial to the health, or the unrestricted sale of peculiarly inflammable oils dangerous to the safety of the community, as might be also the injudicious exercise of a calling which might threaten fire. In such cases the majority without special knowledge of the facts would be likely to accept as correct, and to abide by the decision of those whose duty it was to watch over the public health and safety.

But when these plain principles, founded on states of fact which command universal assent, are passed, and the heated and hazy realm of opinion is entered upon, the conditions are changed. Instead of the exercise by the State of a salutary protective power, whose sphere and limits are understood and acquiesced in by all, there is substituted the spasmodic activity of a fluctuating public opinion. If the final word as to what is or what is not within the scope of the Police Power be left to a legislative majority, all security to the citizen is gone; all he has, all he does, would be subject to the veto or the regulation of the omnipotent half plus one.

A careful consideration of the disapproval shown towards the decisions of *Powell v. Pennsylvania* and *Mugler v. Kansas* will, I think, indicate that great as are the objections to them on the ground of their interference with property rights, the fundamental objection is the menace to the liberty of the citizen which they contain.

In his address to the graduating class of the Yale Law School last year, the Hon. W. E. Russell dwelt upon the tendency to incorporate more and more minute details into State constitutions, in order to place such matters beyond the changing ideas of legislative majorities. He says:²²

"An illustration of the evil to which I refer may be found in the experience of some of our States with constitutional prohibition. However wise and necessary prohibition may be, the proper place for this much-controverted restriction is in statute, not constitutional, law. Dependent for its enforcement upon statute law and a sustaining public sentiment, it gains little by constitutional recognition, while the constitution itself may suffer by the evasions and opposition of a discontented people unable lawfully to assert their will. Referring to this danger a distinguished jurist has forcibly said a constitution is not a code, civil or penal; and whatever tends to turn it into one endangers its ultimate stability by exposing it to every gust of popular excitement or caprice. * * * To put into a constitution a rule which a statute would sufficiently prescribe, and which must be supplemented by a statute to make it effective would be simply to take advantage of the greater permanency of the organic law in the interest of a majority, for a purpose quite foreign to the purpose of that instrument, and might well argue a distrust on the part of that majority of their ability to maintain their ground in the convictions of the people. If this be its significance * * * it would exemplify that tyranny of the majority which the friends as well as the foes of democratic institutions concede to be their greatest inherent danger."

And again:²³ "This modern constitutional growth with its excessive government and its many restrictions firmly fastened on the people seems also to conflict with the principle of freedom from restraint which is the very essence of democracy, finding expression in such terms as free institutions, civil liberty and self government. With its more of control and less of compact it marks an evolution backward in the progress of civilization. The time was, says Spencer, when the history of a people was but the history of its government. It is otherwise now. The once universal despotism was but a manifestation of the extreme necessity of restraint. Feudalism, serfdom, slavery, all tyrannical institutions, are merely the most vigorous kinds of rule, springing out of, and necessary to, a bad state of man. The

²² Address of Hon. W. E. Russell to Yale Law School, June, 1894, p. 30.

²³ p. 28.

progress from these is in all cases the same, less government. Constitutional forms mean this. Political freedom means this. Democracy means this."

But if the constitutions themselves afford no practical protection against the insidious invasion of this subtle power, the citizen feels that he has no longer any firm ground under him. All the conditions of his daily life must be shadowed by a feeling of insecurity which will deaden his energies, and destroy his happiness and usefulness.

This discussion of the Police Power is, perhaps, not strictly within the scope of the subject of this essay, but it has been entered upon with the object of attempting to show that the principles of the application of the Police Power have undergone considerable change. Constitutional provisions seem to be not only flexible but squeezable.

But coming now to the immediate question, we find that the application of the Police Power is even more elastic than the above discussion has shown it to be. In the case of *Munn v. Illinois*, no question of the health, morals, or safety of the community was in issue. The State of Illinois determined that it would be for the benefit of the State that grain elevators should be under public control, and the thing was done. And the Supreme Court of the United States upheld this action as a legitimate exercise of the Police Power, on the ground that the grain elevators were property affected with a public interest. The wide-spread dissent from this decision seems to emphasize the position taken above, that the more the Police Power is invoked to carry out matters of opinion the more danger is there in its application. For of all the various "squeezes" which the constitutional provision has received, this one seems to have been the hardest. The only matter of fact that existed in the case was that the business was a monopoly, and that was qualified by its being only of a "virtual" kind.

In the face of these conditions, the Court took a legal "leap in the dark," and by a construction of the applicability of the Fourteenth Amendment to restrain State Police Power gave that clause a shock which in the minds of many eminent jurists deprived it of any practical force for the future. For the question is one of construction primarily.

"It should be observed, however, that this question is simply one of construction, the object being to ascertain the true meaning of the constitutional amendment. No argument can be of service in solving this question, except by throwing light upon

the purposes for which the Amendment was passed. The prohibition is absolute in terms, and, as was pointed out by Justice Field, the right to enjoy life and liberty is guarded by no more stringent provisions than the right to enjoy property. It is reasonable to imply that the Amendment was not designed to impair the power of the States to enact such laws as were by common consent, at the time of the adoption of the Amendment, deemed within the proper and ordinary sphere of legislative action, even though private rights should thereby be interfered with, but it would not be reasonable to carry this implication further. The States have always the power to take private property when the public interest demands this, by exercise of the power of eminent domain, upon providing just compensation."²⁴

That my statement as to the effect on the Fourteenth Amendment is justified the following will show: "This doctrine that whenever one's property is used in such a manner as to affect the community at large it becomes clothed with a public interest and ceases to be *juris privati* only, destroys the efficacy of the constitutional guarantee."²⁵

The next point in the argument is that because in England and in this country it has always been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and that this has never been regarded as coming within the constitutional provision against interference with private property, therefore it is apparent that down to the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use of private property necessarily deprived an owner without due process of law.

In view of the objections that have been made to this proposition, some of which are given below, it may not be thought presumptuous to express the opinion that a more remarkable *non sequitur* seldom appears in a judicial opinion:

"Formerly it was common by legislation to regulate wages, and the prices of merchandise, or whatever any one person might have to dispose of to another. To some extent this was done in this country in colonial days, but never generally; and the old laws on the subject were unquestionably innovations on common right, and usurpations of authority. In some cases, however, the right to regulate charges is still exercised, and in the following cases may be justified on principle:

²⁴ Morawetz on Private Corporations (speaking of *Munn v. Ill.*) Vol. 2, pp. 1033-1034.

²⁵ Field J. in *Munn v. Ill.*

"1. Where the business is one the following of which is not a matter of right, but is permitted by the State as a privilege or franchise (lotteries, ferries, tolls).

"2. When the State on public grounds renders to the business special assistance by taxation, or under the eminent domain (rail-roads).

"3. When, for the accommodation of the business, special privileges are given in the public streets, or exceptional use of public property or easement (hackmen).

"4. When exclusive privileges are granted in consideration of some special return to the public, or in order to secure something to the public not otherwise obtainable (Slaughter House Cases, 16 Wall. 36)."

The author continues significantly: "To these may be added:

"5. Those employments which are *quasi* public and essential to the business of the country, but of which the circumstances give to a few persons a virtual monopoly at each important commercial center; such as those who own elevators for the storage of grain have in the city of Chicago."²⁶

It is to be observed that the fifth class is not included by the author among those which may be justified on principle.

"Hale's doctrine of property as affected by a public interest referred only to property dedicated by the owner to public use, or to property the use of which was granted by the government, or in connection with which special privileges were conferred."²⁷

This is the view of Hale's doctrine taken by the learned author of Cooley's Constitutional Limitations, as follows: "The phrase 'affected with a public interest' has been brought into recent discussions from the treatise *De Portibus Maris* of Lord Hale, where the important passage is as follows:" quoting the whole passage which ends thus:

"'For now the wharf, crane, and other conveniences are affected with public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest but is affected by a public interest.'"

The author comments on this also:

"If the case of a street thrown open to the public is an apt illustration of the public interest Lord Hale had in mind, the interest is very manifest. It will be equally manifest in the case of the wharf, if it is borne in mind that the title to the soil under

²⁶ Cooley's Const. Law, 245-246.

²⁷ Field J. in *Munn v. Ill.*

navigable water in England is in the Crown, and that wharves can only be erected by express or implied license, and can only be made available by making use of this public property in the soil. If then, by public permission, one is making use of the public property, and he chances to be the only one with whom the public can deal in respect to the use of that property, it seems entirely reasonable to say that his business is affected with a public interest which requires him to deal with the public on reasonable terms."²⁸

It is difficult to conceive how the facts in *Munn v. Illinois* can be brought within those classes which Cooley says may be justified on principle.

The English case of *Allnutt v. Inglis*²⁹ was also relied upon as supporting the right of regulation on account of the "virtual monopoly."

But what says Lord Ellenborough in his opinion in that case?

"Here, then, the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. *If the Crown should hereafter think it advisable to extend the privileges more generally to other persons and places*, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly: but at present, while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction, and it is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches as laid down by Lord Hale in the passage referred to, which includes the good sense as well as the law of the subject."³⁰

The words I have italicized clearly show that this monopoly was one created by the sovereign authority, and removed only by its action.

It seems, therefore, that the English authorities quoted in support of the decision show only that private property is affected with a public interest when public land is used by a private person under a license express or implied, or when the owner of private land himself dedicates it to a public use, or when a monopoly conferring peculiar advantages is granted by the State.

²⁸ Cooley's Const. Limit. 737-738.

²⁹ 12 East 527.

³⁰ pp. 540-541.

The principle that the public interest attaches when the monopoly is a legal one seems to be further supported by the words of Chief Justice Holt, as follows:⁸¹

"Now there are two sorts of acts for doing damage to a man's employment for which an action lies, the one in respect of a man's privilege, the other in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action, though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned."

It may be admitted that in *Munn's* case there was a virtual monopoly, but, as is pointed out by Justice Brewer,⁸² "There are two kinds of monopoly, one of law, the other of fact. The one exists when exclusive privileges are granted; such a monopoly the law which creates alone can break, and being the creation of law, justifies legal control. A monopoly of fact anyone can break, and there is no necessity for legislative interference."

This surely is the kind of monopoly that *Munn* had.

The attempt to bring the case within the classes of the occupations named in the opinion as subject to legislative regulation (common carriers, hackmen, etc.) seems hardly to be more successful. For my quotation from *Cooley's Constitutional Law* shows that all these occupations receive a privilege or benefit from the State.

In the case of *People v. Budd*,⁸³ a similar state of facts was in issue, and the New York Court of Appeals followed the decision of the Supreme Court in *Munn v. Illinois*, and upheld the validity of the statute. In his dissenting opinion in this case, Peckham, J., forcibly sets forth his view of what constitutes a dedication to public use. He says:

"I contend that within the subject now under review, the meaning of the phrase 'devoting one's property to a public use,' as evidenced in the cases cited by the learned Chief Justice (of New York), and also in other cases in this State, is that such devotion or dedication is made when, by reason of it, the public thereafter have a legal right to resort to the property and to use it for a reasonable compensation, or for such as the law provides, or else where some privilege or right is granted by the govern-

⁸¹ *Keeble v. Hickeringill*, 11 East 575.

⁸² *Budd v. N. Y.*, 143 U. S. 517.

⁸³ 117 N. Y. 1.

ment, in which case the right of limitation is based upon, and is really a part consideration for the grant."⁸⁴ And further: "The facts of the case must be taken into account whenever expressions are used of a somewhat general nature, and it is evident that when the English judges and courts spoke of an owner of property devoting it to a public use, or one in which the public had an interest, they meant that by reason of such devotion, the public thereafter had a right to resort to the place where the property was, and a legal right to demand its use on payment of a reasonable compensation."⁸⁵ And again: "Whenever it has been claimed heretofore that property has been devoted to a public use, the term has expressed the fact which existed; that the public had a right of resort to the premises and to use the property, or to demand transportation, etc., upon reasonable compensation being paid or tendered."⁸⁶

Enough has been said to show that in the opinion of those who dissent from the views of the majority of the Supreme Court on this point, the authorities cited by the decision do not support its conclusions, and furthermore, that the circumstances which do in reality affect private property with a public interest are clearly defined.

To repeat Judge Peckham's expressions, "the term has expressed the fact which existed, the public had a right to use the property upon reasonable compensation."

But the Supreme Court says: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use."

No reflection is necessary to perceive the unlimited scope of these words. No intention on the part of the owner to dedicate, no waiver of public right in his favor on the part of the public is required to establish this interference with his business and its profits. All that is requisite is that he shall devote his property to a use in which the public has an interest. The far-reaching effect of this doctrine has been shown by the great lawyers who have criticised it and dissented from it, as the following quotations will illustrate.

Justice Field says in his dissenting opinion:

"The majority opinion holds that as the public are interested

⁸⁴ 117 N. Y. 41.

⁸⁵ p. 52.

⁸⁶ p. 59.

in the storage of grain, the defendant, by devoting the building to that storage has granted to the public an interest in that use, and must submit to have his compensation regulated by the Legislature. If this be sound law, all property and all business are held at the mercy of a majority of the Legislature."

Justice Brewer says:³⁷

"There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man's property is beyond the touch of another's welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest." And further on: "If it (the government) may regulate the price of one service which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property?"

In an address by the Hon. George Hoadly, of New York,³⁸ the cases in which the right of the citizen to protection of life, liberty and property has been in question are reviewed, and certain conclusions are drawn, the fourth and fifth of which are as follows:

"4th. That all property and avocations in which the public have an interest are so devoted to the service of this public that they may be controlled by the Legislative power without the necessity of resort to the power of eminent domain, or compensation.

"5th. That as the extent of the Police Power is indefinite, so also are the facts and circumstances which shall constitute such practical dedication of property or services to others, indefinite. At present they are expressed under an *et cetera*, and it is reserved for the future judiciary to explain this symbol and give its full and accurate meaning."

And Judge Cooley³⁹ says:

"What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business, and are accommodated by it cannot be sufficient, for that would subject the stock of the merchant and his charges to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the

³⁷ *Budd v. N. Y.*, 143 U. S. 517.

³⁸ *Journal of Social Science*, No. 26.

³⁹ *Cooley's Const. Limit.* 737.

public, but his offer does not place him at the mercy of the public in respect to charges and prices."

To sum up the foregoing examination.

The decision in *Munn v. Illinois*, founded upon old common law authorities which, as was said by Justice Field, are in conflict with it, sanctions an application of the Police Power of the State so extended that the constitutional guarantee is nullified, and all power of resistance to the taking of property is logically destroyed. It only remains for me, in leaving this part of the subject, to note that in this decision two Justices dissented.

In *Budd v. New York*⁴⁰ a similar case, decided in 1891, the minority was increased to three; and in *Brass v. Stoeser*,⁴¹ decided in 1893, on substantially the same state of facts, the minority again added one to its strength, four Justices dissenting.

It should also be noted that in this last case the Dakota statute, in addition to requiring the storage of grain for everybody who demanded it at a fixed price, imposed upon the owner of the warehouse the additional burden of advancing money to insure the property thus forced upon him. Justice Brewer in his dissenting opinion says that if the Legislature can do this, "I can only say that it seems to me that the country is rapidly traveling the road which leads to that point where all freedom of contract and conduct will be lost."⁴² It would seem from this last case that the quality of being affected with a public interest attaches to the cash of the owner of a grain warehouse as well as to the warehouse itself.

One more matter connected with the past history of this subject.

In 1889 the Supreme Court, in the case of *Chicago, etc., R. R. v. Minnesota*,⁴³ decided that when the Legislature establishes a railroad commission, and the Act is interpreted by the Supreme Court of the State as providing that the rates of charges recommended and published by the commission should be conclusive on the railroad companies, and that, therefore, there can be no judicial inquiry as to the reasonableness of these rates, the Act is in conflict with the Constitution of the United States, as it deprived the company of its property without due process of law, and of the equal protection of the laws. From this decision three Justices dissented.

Justice Bradley, in his dissenting opinion, says:

⁴⁰ 143 U. S. 517.

⁴¹ 153 U. S. 391.

⁴² 152 U. S. 410.

⁴³ 134 U. S. 418.

"This decision practically overrules *Munn v. Illinois*, the governing principle of which was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative and not a judicial prerogative. I differ from the majority of the Court in thinking that the final tribunal is the Legislature, they the judiciary."

Thus far I have dealt with the matter involved in this decision from the point of view of the arguments adduced in its support in the decision itself, examining these arguments in the light of legal precedence, and testing them by the criticism of legal authorities. And the foregoing pages will, I think, have shown that, viewed as a legal question only, the unlimited scope of the doctrine cannot be supported. Can any other reasons be found for sustaining the decision? In what follows I shall try and show that there can.

A very careful study of the opinion as it was delivered by Chief Justice Waite leaves the student in wonder that the conclusions arrived at from the authorities used as support could ever have commended themselves to the Court. So untenable do they appear that one is forced to seek some underlying ground of right or expediency as the real foundation for the decision, the arguments being made to support the conclusion, rather than the conclusion being deduced from the argument. With this in mind, the following passage in the opinion seems of great significance:

"It is of no moment that no precedent can be found for a statute precisely like this. The business was one of recent origin, rapid growth, and one in which the whole public has a direct and positive interest. *This statute simply extends the law to meet this new development of commercial progress.* There is no attempt to compel these owners to grant the public an interest in the property, but to declare their obligations if they use it in this particular manner."

The words I have emphasized seem to contain the germ of the principle upon which the decision was made. Later on the Chief Justice says:

"Rights of property created by common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitation. The great office of statutes is to remedy defects in the common law as they are developed." It is true that he also says: "To limit the rate of charges for services rendered in a public employment, or for the use of property in which the public has an interest, is only

changing a regulation which existed before. It establishes no new principles in the law, but only gives effect to an old one."

This latter statement, however, takes nothing from the former ones, for the question in this case was whether the public *had* such an interest in the business as to justify the regulation of the charges made in it, not, whether, granting the interest, the regulation could be made. It would appear, then, that the real principle of the judgment is that the statute simply extends the law to meet this new development of commercial progress.

What does this mean? It means that the progress of events had given to a few individuals, exercising a lawful private trade, a virtual control over the grain business passing through Chicago, and that the Legislature had therefore placed this private business under public regulation by this statute. It was in effect a statute against monopolies. Hence we have the principle, Monopoly justifies Control.

It can hardly be denied that the old common law exercised such control, whether the monopoly was one of law or one of fact, and the way it viewed attempts to enhance the price of the necessities of life is forcibly set forth in the case of *Rex v. Waddington*⁴⁴ decided in 1801.

The defendant was indicted for what would, in our day, be termed trying to "corner" hops.

Lord Kenyon says:

"But this is to me most evident, that in whatever manner the supply is made, if a number of rich persons are to buy up the whole or any considerable part of the produce from whence such supply is derived, in order to make their own private and exorbitant advantage of it to the public detriment, it will be found to be an evil of the greatest magnitude, and I am warranted in saying that it is a most heinous offense against religion and morality, and against the established law of the country. That our law books do declare practices of the sort with which the defendant is charged to be offenses at common law cannot be denied."⁴⁵

Lord Kenyon then meets the objection that the statutes 5 and 6, Ed. vi., C. 14, against regrators, forestallers and engrossers, having declared what the common law was, and it having been determined that hops were not a victual within the Act, therefore the engrossing of hops was never an offense at common law, not being a necessary of life, by showing that times had changed, and that hops had now become necessities. He continues by

⁴⁴ 1 East 141.

⁴⁵ p. 154.

saying that if the defendant went into the market "for the purpose of making his purchases in the fair course of dealing, with a view of afterwards dispersing the commodity which he collected in proportion to the wants and conveniences of the public, whatever profit accrues to him from the transaction no blame is imputable to him. On the contrary, if the whole of his conduct shows plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity, to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price, who can deny that this is an offense of the greatest magnitude? It was the peculiar policy of this system of laws to provide for the wants of the poor laboring classes of the country."⁴⁶

"It is our duty to take care that persons in pursuing their own particular interests do not transgress these laws which were made for the benefit of the whole community. I am perfectly satisfied that the common law remains in force with respect to offenses of this nature. * * * There I find nothing which trenches on what I have said, but only a repeal of certain statutes, upon none of which is this prosecution founded, but upon the common law."⁴⁷

And Grose, J., says in the same case:

"When, however, we recollect the anxiety shown by our ancestors to prevent the commission of this class of offenses, and when we recollect what the common law as handed down to us by our ablest reporters and commentators upon this subject is, we cannot but deem that it would be a precedent of most awful moment for this Court to declare that hops, which are an article of merchandise and which we are compelled to use for the preservation of the common beverage of the people of this country, are not an article, the price of which it is a crime by undue means to enhance; or that the statute 12 Geo. III., C. 71, which expressly repeals certain specified statutes, was intended to repeal other statutes not specified, and to repeal that which the common law of the land has ordained for the protection of the poor, in preventing the advancing of the price of those commodities without which they cannot exist."⁴⁸

"In mitigation of punishment the Court has been repeatedly and strongly addressed upon the freedom of trade, as if it were

⁴⁶ 1 East 157-158.

⁴⁷ pp. 158-159.

⁴⁸ pp. 162-163.

requisite to support the freedom of trade that one man shall be permitted, for his own private emolument, to enhance the price of commodities become necessities of life, and thereby possibly prevent a large portion of his majesty's subjects from purchasing those necessities at all. The freedom of trade, like the liberty of the press, is one thing, the abuse of that freedom, like the licentiousness of the press, is another. God forbid that this Court should do anything that should interfere with the legal freedom of trade. * * * But the same law that protects the proprietors of merchandise takes an interest also in the concerns of the public; by protecting the poor man against the avarice of the rich; and from all times it has been an offense against the public to commit practices to enhance the price of merchandise coming to market, particularly the necessities of life, for the purpose of enriching an individual. * * * For the sake of the public, and especially of the poorer part of his majesty's subjects, the law pays particular respect to the necessities of life, the price of which a man is not permitted to enhance by undue means for his own private profit. In these and other respects the freedom of trade has its limits, and is, and must be, like our other liberties, regulated by law."⁴⁹

I have quoted this opinion at somelength, as it seems to show that the common law at all times would interfere to prevent anything done by a private individual that might unduly enhance, to his profit, the necessities of life.

The Court in *Munn v. Illinois*, appear to have applied the reasoning of the common law courts applicable to cases of virtual monopolies of *law* to a case where the virtual monopoly was one of *fact*. If this latter case of monopoly was controllable at all at common law, it was under the principles laid down in *Rex v. Waddington*, quoted above.

In *Munn's* case the article affected was grain, the first of all necessities of life; the charges made by the warehouseman were thought by the Legislature of Illinois to be excessive and unfair. Have we not here all the elements necessary to bring the case within the controlling power of the old common law as laid down above? It would seem that if the Court, finding this to be a case for which, as was said, there was no precedent, had, in recurring to the old principles of the common law, supported the statute on the broad grounds stated in *Rex v. Waddington*, the analogy would have been much closer than it was to the dictum of Lord Hale.

⁴⁹ 1 East 163-164.

If, then, this statute can be brought under the common law forbidding the doing of anything which enhances unduly the necessities of life, in what direction does this lead us? It would be an expression of the approval by the Supreme Court of restrictions put upon monopolies of anything necessary to the public. Such an approval would undoubtedly commend itself to the minds of the majority of the people of the United States.

The rapid development of Trusts and Combinations has angered and alarmed the masses, who have constantly before them the fear of being robbed by the capitalists.

The Hon. W. E. Russell, in the address from which I have already quoted, says:

"You remember the thought expressed by Sir Henry Maine that society, in its opinions and necessities, is always in advance of law; that the progress of the one and the stability of the other make a gulf between them, often closing, often opening; but that the greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed."⁵⁰

It may be, then, that the Supreme Court, recognizing the great and growing hostility of the people to monopolies in any form, and finding that the law as it stood did not meet the popular desires, accepted this statute as an extension of the law to meet "a new development of commercial progress," founding its decision upon the common law, though upon unfortunate examples of it, and, thereby, in Sir H. Maine's words, closing the gulf existing between the law and the opinions and necessities of society.

Although, then, in a sense, this may be an extension of the law to meet a development of commercial progress, it does not follow that it is an extension forward. It would rather seem to be an extension backward. For the principle that really received the sanction of the Supreme Court was the right of the government to interfere with all private property, with its use and enjoyment, whenever it considers it necessary for the public good to do so. My reference to Cooley's Constitutional Law has shown that in old times it was customary to regulate almost every transaction of men by governmental rules.

"Such legislation," says Earl, J.,⁵¹ "may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in actual time we will not be far away in practical statesmanship from those ages when

⁵⁰ Address to Yale Law School, p. 9.

⁵¹ In the matter of Jacobs, 98 N. Y. 114-115.

governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long in, in all civilized lands, regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one."

This expresses in clear terms the ideas which have heretofore been the prevailing ones in free countries, and which were supposed to be especially dear to all democracies.

To repeat Spencer's words, "Feudalism, serfdom, slavery, all tyrannical institutions, are merely the most vigorous kinds of rule, springing out of, and necessary to, a bad state of man. The progress from these is in all cases the same, less government. Constitutional forms mean this. Political freedom means this. Democracy means this."

But does it? It was undoubtedly the idea of the older professors of democracy that it meant less government, the smallest possible interference with the individual. I think, however, that time has shown that this is not true. The tendency of every country that is in name or effect democratic is towards more government, more interference with the individual. The practical working of the decision of the State of Kansas to prohibit entirely the manufacture and sale of intoxicating liquors furnishes an example of an interference with personal liberty, and a disregard of what have hitherto been considered as private rights which the most despotic government would have hesitated to perpetrate. In old days the people seem to have required protection against their rulers, now they seem to require protection against themselves. Whether this is the outcome of the conviction, more and more widely extended, that every action of man, however personal it appears to be, in reality affects his fellow citizens, or whether it is that majorities are as strongly disposed as monarchs to be tyrannical and impose their will on their fellow countrymen, I do not venture to say. But the fact is too plain to be disputed, that the freer a people is politically, the more government it has. It is almost pathetic to observe the growing belief of the masses of the people that legislation can cure all the ills of life.

When, therefore, the growing power of combinations and monopolies began to attract attention, the demand was for legislation to suppress them. And here the gulf between law and

social opinion at once opened. It is impossible to suppose that the framers of the Fourteenth Amendment had in view any such omnipotent exercise of the Police Power by the State as would practically nullify the protection it afforded, and therefore any decisions that have that effect have not been received with approval by lawyers.

But what if the enforcement of the Fourteenth Amendment should stand in the way of remedying matters that have become, in the minds of the people at large, crying abuses? Here, then, seems to lie the difficulty that the Supreme Court had to meet. The people of Illinois believed that monopolies of this kind were injurious to them; they believed that by controlling them by law they could rid themselves of the evil, and they enacted such laws. What would have been the effect if such laws, enacted, as the people believed, to afford them protection against great injury, had been declared unconstitutional by the highest authority in the land? Would not the law have been so far discredited that every means would have been tried to evade and pass it by? But recently the question of legalizing the Sunday opening of saloons has been agitated in New York, and the facts brought to light seem to show quite clearly that a law that does not command the assent of the people has very little effective strength.

Viewed from the standpoint of the political economist, can it be affirmed that the Fourteenth Amendment must be so rigidly interpreted as to make the welfare of the citizen subordinate to the rights of private property? It has been said that the effect of the doctrine of *Munn v. Illinois* is to put all private property at the mercy of a legislative majority. What would be the effect of the opposite view if pushed to its logical conclusion?

It would be that the general welfare of the citizens, the price of their food, of their clothing, of all the necessities of life might be put at the mercy of a few men who, in the lawful exercise of the means open to them in their private business, might obtain such control over the sources of supply as to fix the price of all commodities at their will.

It is no answer to this to say that excessive prices are prohibitive, and consequently that a monopoly would be of no practical value if carried too far. Before that point was reached there would be a great deal of inconvenience, perhaps suffering, throughout the country, and incentives to violence and crime would be very largely increased.

Justice Brewer says:⁵⁸

⁵⁸ *Budd v. N. Y.*, 143 U. S. 517.

"That property which a man has honestly acquired he retains full control of, subject to these limitations: first, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit."

This is very true, but in the state of facts just supposed, can it be said that such a use of one's property does not injure his neighbor? And if it does, where would the power lie to prevent this injury if not in the inherent power of self-preservation of society, which, if it is to be exercised peaceably, must act through legislative channels?

In truth, viewed in this light, and setting aside the inapplicable technicalities with which the decision was supported, it seems that the Court intended to lay down the principle known to the common law, and in earlier times frequently put into force, that there is a point beyond which the use of private property is not lawful; and that that point is reached when, though by means in themselves perfectly legitimate, the well-being of the community is menaced by its use. And that when this occurs, the use is one in which the public have an interest, and in the preservation of that interest are entitled to regulate the use so as to minimize the injury. It may be called Police Powers, it may be called self-preservation, but *Salus populi suprema est lex*.

Before turning to the tendencies of this doctrine, it will perhaps be well to sum up very briefly the conclusions I have drawn. They are these:

1. That, taking the decision as it appears from the arguments brought forward to support it, and from the authorities cited, it fails to establish its conclusions, because the argument is an attempt to apply the common law principles appropriate to legal monopolies to a monopoly of fact, a very different thing.
2. That the real foundation of the decision is the desire of the Court to recognize a popular demand, and by so doing to bring the law into harmony with the wants and wishes of the people, in the face of a new development of commercial progress.
3. That if the subject of the decision was one which menaced the security and well-being of the community, the inherent right of self-preservation is to that extent paramount to the right of the use of private property by the individual, and is entitled to enforcement by the common law, no constitutional provision limiting, or having been intended to limit, this fundamental and inalienable right.

The scope of this essay makes it now necessary to pursue the inquiry as to the tendencies of the doctrine of property affected

with a public interest, and in doing so I leave behind me the comparatively sure ground of legal principles and precedents, and enter upon the slippery path of prophecy and conjecture.

The first thing of course that occurs to the inquirer is that this doctrine strikes a telling blow at individualism, and lends a strong support to the socialistic ideas of the day. To quote again from Justice Brewer:

"The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property is both the limitation and duty of government. If it may regulate the price of one service which is not a public service * * * why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so 'Looking Backward' is nearer than a dream."⁶⁸

And this, no doubt, in the minds of those whose opinions are formed on the theories prevalent during the greater part of this century, is a very pestilent innovation. In a work just published by Mr. Ernst von Halle, called "*Trusts or Industrial Combinations and Coalitions*," which is a translation and amplification of a report made by the author to the *Verein für Social-Politik*, a most instructive and able examination is made of the development and conduct of the great combinations in the United States. On the main portion of his work I do not, of course, propose to touch, as it would be beyond my purpose, and, moreover, it should be read in its entirety. But I mention it here because, in his first chapter, the author traces the course of public opinion in the United States in regard to monopolies. "The Constitution," he says on page 2, "aimed at securing equal personal rights for every one, and at prohibiting whatever might be attempted to cripple them, or to interfere with the free transaction of lawful private business. It was drawn up in the time of the complete predominance of the 'physiocratic' doctrine of natural rights, and the rise of the *laissez faire* theory." And after showing that these ideas permeated all public life for the first half of this century, and that they seemed for a time justified by the want of success attending State ownership, as in banks and railroads, and of the opposite result achieved by individuals, he continues: "And a disinclination for the interference of society with the sphere of the individual was more widely diffused than in any other country. To forbid as little as possible, and to regard what was not forbidden as silently permitted, to consider a right once granted as

⁶⁸ *Budd v. N. Y.*, 143 U. S. 517.

irrevocable, these were the principles on which public opinion was built. The device of free competition partook, in the eyes of the people, of the character of an eternal, holy truth, remote from the influences of time and economic conditions. Whoever disregarded it was *eo ipso* wrong; his actions were against public policy."

One or two references to authorities will show that this is correct. "Instead of saying that all private property is held at the mercy and judgment of the public, it is a higher truth that all rights of the State in the property of the individual are at the expense of the public."⁵⁴

"The less the State interferes with industry, the less it directs and selects the channels of enterprise, the better. There is no safer rule than to leave to individuals the management of their own affairs. Every individual knows best where to direct his labor, every capitalist where to invest his capital. If it were not so, as a general rule, guardians should be appointed, and who would guard the guardians?"⁵⁵

These, as Mr. von Halle shows, were the dominant ideas in England in the eighteenth century. But in that country their force gradually diminished until, in 1844, Parliament abolished all restrictive legislation in this direction. But in this country the courts did not adopt the English precedents. "They upheld the validity of the unchanged common law and statutory restrictions, occasionally even of some repealed in England before the time of the separation."

During the prevalence of these principles, the doctrine of individualism was combined with that of *laissez faire*. But when the changed economic conditions brought combinations into existence, the advocates of individualism, in calling for State interference, were compelled to abandon that part of their old doctrine. As Mr. von Halle puts it in his introduction: "Advocates of this principle (*laissez faire*) certainly fall into their own trap when they cry out for restrictions against things that have naturally developed, and for State interference to secure the unhindered working of natural forces."

In view of these facts is it so certain that the principles of the doctrine of *Munn v. Illinois* are socialistic? May it not be that the upholders of individualism against socialism, alarmed at the tendency of combination to destroy the individualism of industry, have abandoned their old doctrine of *laissez faire*, and invoked the aid

⁵⁴ Address to Yale Law School, 55 New Englander 97.

⁵⁵ 58 Maine 598.

of the State to crush these forces which threaten the existence of their cherished belief?

At first sight it would certainly appear, as I have before suggested, that the exercise of the power of the State to control the profit made in a private business is, in its essence, socialistic. But against what is the exercise of the power specially directed?

Against a monopoly.

The principle involved in monopoly, whether by a single individual or an association of individuals, is the destruction of competition. Competition is the ideal of the individualist, the *blanc* of the socialist. To the former it is the only principle by which the greatest good of the people is to be attained. Low prices, high incentive, unlimited opportunities to every one by industry, energy, and skill to carve out for himself a successful career in what is always called the struggle for existence; all these are obtainable only through competition.

Holding this faith, can the individualist view with anything but alarm the growth, in any direction, of a principle so antagonistic to his scheme of life? He cannot meet the danger and destroy it by individual effort, for easy though it may be to argue that any one can break a monopoly, it can be broken only by a force equal or superior to it in power. And that implies the abandonment of principle in the formation of counter-combinations strong enough to fight the monopolist on his own ground. Feeling, then, his impotence, the individualist turns to the State, and invokes its assistance as against an enemy that is sapping the foundations of the national existence.

The principle, as I understand it, running through the whole of the common law in its antagonism to monopolies, was that they interfered with the free fight for existence which goes by the name of competition in political economy.

I would submit, therefore, that the doctrine of *Munn v. Illinois* may be regarded rather as an effort of individualism to stem the rising tide of combination, than as socialistic; a stand made by the individual rather than a move forward of socialism.

It can hardly be denied that the principle of combination is growing every day in all the most progressive countries of the civilized world. Whatever may be its ultimate fate, individualism is at the present time losing its hold on the faith of mankind. Possibly the intensity of the struggle of life in our time makes the individual more keenly conscious of his weakness. Judge Baldwin says: "John Stuart Mill has said that the great characteristic of modern civilization, of the new world which mankind

is forming for itself, not in territory but in mind and action, is that the importance of the masses is constantly growing greater and that of individuals less. It may be a tendency to be resisted, but it is certainly one that we must recognize, and recognize as a constant force."⁵⁶ All around us we see the signs of the tendency to combine. Perhaps the greatest instance of combination in modern times is that of the working classes in Trades Unions. It almost raises a smile to recall the furious denunciations and direful prophecies which this movement called forth in its beginning. But the times were with them, and they have lived to become a mighty force in the industrial world, and a force which, on the whole, makes for the peace and good order of society. It is significant that the incorporation of Trades Unions has lately been advocated by one of the coolest and least visionary of English political leaders. And so, true it is that notwithstanding all opposition on the part of those who do not read the signs of the times, the principle of monopoly or combination gains ground steadily and surely. What says Mr. von Halle, fresh from his study of the subject in its most recent development in the United States?

"While theorists still discuss the advisability, lawyers attack the legality, and politicians doubt the constitutionality of the principle of combination, we learn daily of formation of new combines throughout the civilized world. This seems somewhat to discredit the cheerful hopefulness of the believers in the orthodox teaching that combinations are nothing but temporary aberrations from the natural law of free competition. At the same time, it becomes evident that mere legal prohibition has proved neither successful nor productive of any satisfactory results. Men who were among the strongest opponents of all sorts of combinations a few years ago now officially admit them to be in certain instances the lesser evil."⁵⁷

The tendency of the doctrine of property affected with a public interest seems, then, to be rather to support the individualist than the socialist, and I venture to suggest that those who oppose it on the ground of its socialistic tendency have mistaken its bearing.

The error may perhaps have arisen from the line of argument taken by the Court in the opinion, a line which, as I have tried to show, was neither applicable to the facts nor sustained by the authorities cited in its support.

⁵⁶ Yale Law Journal, March, 1895, p. 136.

⁵⁷ Introduction, pp. ix-x.

The mistake seems to lie in assuming that the public interest is created by the *benefit* conferred. Justice Field says in the case:

"This Court seems to hold that property loses something of its private character when employed in such a way as to be generally useful." And Justice Brewer says: "I cannot bring myself to believe that when the owner of property has by his industry, skill, and money made a certain piece of his property of large value to many, he has thereby deprived himself of the full dominion over it which he had when it was of comparatively little value; nor can I believe that the control of the public over one's property or business is at all dependent upon the extent to which the public is benefited by it."⁵⁸

If this were the principle, the doctrine would undoubtedly be socialistic, for it would sanction the doctrine that when the benefit to the public created by a private business became sufficiently large, the public might claim an interest in it to the detriment of the owner.

But it is suggested that in this case the public interest was not created by the *benefit* derived from the business, but by the *injury* resulting from it. The exact words used were: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use." These words, taken alone, might favor the construction put upon them by the dissentients, but when considered in connection with other expressions in the opinion, their more natural meaning would appear adverse to it. Thus:

"A member of a body politic necessarily parts with some rights or privileges, which, as an individual not affected by his relations to others, he might retain. This does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize laws requiring each citizen to so use his property as not unnecessarily to injure another."

And later on: "The grain elevator business in Chicago was, or might be, a virtual monopoly, and this notwithstanding its vast importance. The business, therefore, if any business can be, was clothed with a public interest, and ceased to be *juris privati*."

From this it would certainly appear that the right to regulate was derived from the injury caused by the monopoly to the public at large. And this view is sustained by the language used by Justice Bradley, one of the majority, as quoted by Justice Brewer.

⁵⁸ Budd v. N. Y., 143 U. S. 517.

"The inquiry there (in *Munn v. Ill.*) was as to the extent of the Police Power in cases where the public interest is affected, and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen, in other words, when it becomes a practical monopoly to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the Police Power."⁵⁹

And according to the ideas generally prevalent, it may be asserted that on this principle a like decision would meet with general approval if a monopoly were created in any other business which affected the masses of the people. To refer again to Justice Brewer: "Surely the matters in which the public has the most interest are the supplies of food and clothing. Yet can it be that by reason of this interest the State may fix the price at which the butcher may sell his meat, or the vendor of boots and shoes his goods?"⁶⁰

I do not hesitate to assert that if a monopoly were created in these articles, a demand for State interference would be too universal to be resisted.

I draw, then, the conclusion that the tendency of this decision, founded as it seems to me to be on an injury to the rights of the public, and designed as it is to prevent the destruction of competition by monopoly, is opposed to the principles of socialism, and is an effort of the opposing party to stop the advance of its enemy.

My first ground for this conclusion, as shown above, is that the legislation in question was against monopoly and therefore in support of free competition.

My second ground is that the *benefit* to the public is not the basis of the power to regulate, but the *injury* to the public.

On this latter ground, there is no taking away from anyone that which he has honestly acquired by his skill, foresight, energy, and industry. It is an action by the public to preserve its members from threatened injury. "There is no attempt," says Chief Justice Waite, "to compel these owners to grant the public an interest in the property but to declare their obligations if they use it in this particular manner."

It is now nearly twenty years since this decision was made, and if, as it seems to me, its intention was to support the old ideas in favor of individualism and against monopolies, has it succeeded?

⁵⁹ *Brass v. Stoeser*, 153 U. S. 391.

⁶⁰ *Budd v. N. Y.*, 143 U. S. 517.

The answer must be, I think, no. If it has not succeeded, it is not because of the want of legislation in its favor. Laws have been passed, constitutional provisions have been made continually to prevent the further development of monopoly, and to preserve the principle of free competition in all its vigor. But despite them all, the opposite principle makes more headway each year, bringing over to its side, as Mr. von Halle says, many of those who formerly opposed it. The day of small things seems to have gone by, and the struggle of the individualist against combination appears to be growing weaker. It is not necessary to illustrate this by examples. The fact is patent to anyone who reads a newspaper. The ideas of men are changing, and the constantly recurring industrial difficulties, the more frequent depressions in trade, over-production, diminution of profits, difficulties with artisans, strikes, and the universal uncertainty and gloom cause many to doubt the everlasting truth of the principles they have heretofore held.

Mr. von Halle says:

"In the United States public opinion has to decide finally about the meaning and nature of things. It will not be able, in the long run, to lean upon mere theories and maxims, it will be forced by the actual development to undergo changes, to reform and remodel itself in correspondence with the great laws of historical progress. The old ideas about the infallibility and exclusive desirability of individual and unrestricted activity have begun to fade. The masses still adhere to them, and are supported therein by the newspapers and politicians who prefer popularity to thoroughness or thought, and by the cheap economics of old-fashioned every-day economists, who are not able to perceive that since the time of their youth there has been any change or progress in practical life, as well as in the scientific interpretation of it. But whosoever tries to understand the times, at once perceives the different character of modern problems, and the necessity of new standards of judgment."⁶¹

In what this tendency will result I do not dare to say. At present it seems to be one that is so powerful that it is not controllable by any of the forces brought against it by those who oppose and fear it.

In "Looking Backward," the stupendous social change imagined is founded on the development of the principle of Trusts and Combinations, which are supposed by the author to have

⁶¹ p. 142.

educated the people in the principle that competition is destruction, and that in combination lay the remedy for our social troubles. He shows how the great corporations and trusts passed through a time of desperate popular opposition, but going on their way unchecked by the clamor against them, they finally absorbed all the small capitalists in the country. By their action they had educated the whole mass of the people into seeing that these gigantic affairs had been directed with an efficiency and economy unattainable in small operations, and that the larger the business the simpler the principles that can be applied to it.

"Thus it came about that, thanks to the corporations themselves, when it was proposed that the nation should assume their functions, the suggestion implied nothing which seemed impracticable even to the timid."⁶³

It is curious to place side by side with the vision of the dreamer of ten years ago the conclusion of the practical inquirer of to-day. Says Mr. von Halle: "It is my belief that the future belongs neither to the prophets of individualism, nor to the ideals of the social democrats. Its next phases belong to social reorganization. And the probability is that this will show a corporate character, and will be sustained and controlled by public supervision."

Whether the present tendency to combination is to have permanent and far-reaching results destined to change the whole social organization of the civilized world, or whether it is but a temporary phase of feeling arising from the weariness and sense of weakness and helplessness born of the keen and embittered struggle for existence in which the modern world is engaged, I cannot pretend to decide.

But that the tendency exists is not to be denied, and it is rather because of its opposition to this tendency of the times than because of its failure to command assent from the legal profession that I look for the ultimate reversal of the decision that I have been discussing in this essay.

W. Frederic Foster.

⁶³ "Looking Backward," p. 58.

THE POWER OF STOCKHOLDERS TO BIND A CORPORATION.

MUNSON PRIZE THESIS.

In entering upon a discussion of the power of stockholders to bind a corporation it is necessary at the outset to gain a definite conception of what is embraced in the meaning of the term "to bind," as it is hereafter to be used.

In the first place, in its more restricted sense the word, as used in matters appertaining to the law, would seem to imply the existence of a contract to which the parties are to be bound. Were this the meaning which now is to be attached to it, the matter in question would be restricted to the power of stockholders to make contracts enforceable against the corporation. It is not intended to limit the subject in this way, but to take the word in a broader sense so as to include not only a discussion of the validity of the contracts above mentioned, but also the power of stockholders to control the affairs of the corporation in other ways, as by prescribing particular methods of carrying on the corporate affairs, by committing the company to a specific course of action, etc.

In the second place its members may by their actions bind the corporation either directly or indirectly. It is a natural consequence of the peculiar nature of this class of organizations that for the actual performance of all that they do they are obliged to resort to the employment of agents. These agents are subject to the general rules governing that class of persons, and so far as their acts are conformable to these rules they are valid and binding upon the corporation. They are appointed by the stockholders and their authority is derived from them, hence since the act of the agent is the act of the principal, the stockholders in employing them may be considered as themselves acting indirectly and as indirectly exerting through them the power to bind the corporation. It is not the object of this paper to enter into a discussion of the power of the stockholders thus indirectly to bind the corporation, as this is simply a matter of the application of the principles of agency. But apart from this indirect method there

exists in the stockholders the power directly to bind the corporation, even though in the execution of that power the intervention of agents is indispensable, and it is this power independent of its instruments that at present occupies our attention.

The consideration of the subject as thus presented naturally divides itself into three heads which will be taken up in their order:

First, the power of the individual stockholder, and of stockholders acting individually.

Second, that of the majority.

Third, that of all the stockholders acting unanimously in a corporate capacity. This last topic will be found to open up such an extensive field that justice could be done to it only in a treatise of much greater scope than this, and hence an attempt will be made merely to apply to it briefly the principles which are dealt with in the first two heads.

Before entering upon the discussion of this power as applied to corporations it should be observed that great light is thrown upon the subject by a constant reference to the principles applying to partnership and other companies. In fact to a large extent the rules that govern the partnership in this respect are equally applicable to the corporation. And where there is a diversity in them a comparison of the theories underlying the two organizations will not only explain this, but it will also assist in making clear what are the limitations upon the power in each case. Hence, in each of the three aspects in which the subject is discussed, the rules applicable to a partnership under the same circumstances are reviewed.

I.—OF THE POWER OF THE INDIVIDUAL STOCKHOLDER, AND OF THE STOCKHOLDERS ACTING INDIVIDUALLY.

Of the Individual.—It is a fundamental principle of the partnership that each member is in all matters within the apparent and legitimate scope of the partnership business the general agent of his co-partners, and the firm and all its members are liable for whatever is done by him in transacting the business of the partnership in the ordinary way. The position of the stockholder of a corporation is entirely different. He is neither the agent of the corporation nor of its members, nor are his acts or contracts, as an individual, binding on either, though made with reference to the affairs of the corporation and for its benefit.

The reasons for this difference in the powers of the members of a corporation and that of a partnership are to be found in a

comparison of the natures of the two organizations. The partnership can in no sense be viewed as having an existence apart from that of its members. Its liabilities are their liabilities. They, in short, are the partnership. The corporation on the other hand, while it, like the partnership, is made up of individuals, is an entity entirely distinct from the members that compose it. It is a legal person, endowed with powers that belong in no wise to its corporators, and which cannot be exercised by them. Its liabilities are not the liabilities of its members, except to the limited extent to which they have by their subscription assumed them. It follows then that a stockholder, acting not in a corporate capacity, should have no more power to control this separate and distinct individuality than should any other person. Nor does the fact that his interests are bound up in that entity give him this power, for by his contract of membership he has surrendered his control, except in so far as by his vote he participates in corporate matters.

A second reason for the wider power of the partner as compared with that of the stockholders is derived, not theoretically, but from the practical working of the two associations. The partnership is made up of comparatively few persons, who have united in a common enterprise with a full knowledge of one another and with confidence and reliance each in the other. Not so in the case of the corporation which from its origin contemplates a membership more or less numerous and composed of individuals whose very existence may be unknown to the others. It stands to reason, therefore, that in his contract of membership the stockholder has intended to confer upon his fellows no such powers as does the partner on entering into the partnership.

Of Stockholders Acting Individually.—The principle having thus been established that the individual stockholders cannot bind the corporation, it necessarily follows that any number of the stockholders acting individually can have no greater power in this respect. And when carried to its extreme it is a necessary consequence of this rule that stockholders owning a majority or even all the stock of the company cannot control the corporation, except when acting duly in their capacity as members of the corporation. This applies also with equal force to a single member who himself represents a majority or even all the stock.

Illustrations.—In conformity with these rules it has been held that a stockholder has no authority to release a debt due the corporation.¹ That individual members cannot transfer the corpo-

¹ *Harris v. Mfg. Co.*, 4 Blackf. (Ind.) 267.

rate property.³ Nor can they even although holding a majority of all the stock, make a valid lease or sale of such property.³ Nor can they mortgage the same.⁴ Shareholders, when not acting as a corporation, cannot convey lands of the corporation though all join in the deed.⁵ The owner of all the capital stock of a corporation does not become thereby the legal owner of its property, and cannot maintain replevin for it in his own name.⁶ In the case of *American Preserves Co. v. Norris* (43 Fed. Rep. 714), the whole ground is covered in the following words: "It is familiar law that a corporation has a personality of its own, distinct from that of its stockholders; that it is not affected in the most remote degree by contracts made by its stockholders with third parties, whether they own much or little of its capital stock, and is not bound to discharge any personal obligation assumed by its stockholders."

Having thus established the rules governing the first division of our subject we are now ready to proceed to the second.

II.—OF THE POWER OF A MAJORITY.

Its Extent.—In considering the power of a majority it will be found that it is similar in both corporations and partnerships. In the charter on the one hand and in the partnership agreement on the other are laid down in greater or less detail the general purposes and ends of the organization. In becoming a member both the stockholder and partner impliedly agree that in all that is necessary or incidental to the attainment of these purposes the majority shall have supreme authority and may bind the association. The necessity of implying such an agreement is evident when it is considered that if there were no such understanding it would be possible for one dissenting member to prevent the transaction of any business whatsoever, however thoroughly it might be included within the purposes of the association. The only course then remaining to the company would be to secure the concurrence of all the members in every matter concerning the conduct of the company. As a consequence of this in the case of a partnership the business of the firm would in all probability be frequently brought to a complete standstill and its legitimate purposes totally defeated. *A fortiori* would this be the case in the

³ *Humphreys v. McKissock*, 140 U. S. 312.

³ *Hopkins v. Lead Co.*, 72 Ill. 379.

⁴ *Engleman v. Dearborn*, 141 Mass. 590.

⁵ *Wheelock v. Moulton*, 15 Vt. 519.

⁶ *Button v. Hoffman*, 61 Wis. 20.

corporation, a body composed in many instances of a great number of individuals, more or less scattered and inaccessible, and all perhaps actuated by conflicting motives and interests. To attempt to gain the unanimous consent of such a variety of constituent elements would certainly be impracticable, and for business purposes utterly impossible. Hence as the only alternative we are led to conclude that the acts of a majority, in so far as they are consistent with the charter are binding upon the corporation.

Its Limit.—From the fact that this power of the majority rests wholly upon the original contract of the members, be it a charter or a partnership agreement, it follows that in both classes of organization it must be limited in its extent by the scope of that same contract. To adopt any other view would be to hold that the dissentient stockholder would be compelled to resort to one of two courses of action, both equally unjust. On the one hand he could remain a member of the corporation and be bound by the act of the majority, thereby being made a party to an obligation which in entering into the corporation he had never contemplated assuming, which he had never agreed expressly or impliedly to assume, and which by his dissent he had even refused to assume. That such a case is extremely unjust is palpable, and the other alternative is equally oppressive. All that would remain for such a stockholder would be to withdraw from the corporation. In this way a majority could absolutely control the organization, and the existence of such a power, susceptible to so great abuses and so conducive to corruption, would open the way to the greatest injustice. Hence, we derive the general principle that *a majority of the stockholders can bind the corporation in all matters within the scope of the corporate purposes and in such matters only.*

Illustrations.—As an illustration of this general principle may be cited the leading case of *Natusch v. Irving* (2 Cooper's Chan. 358), in which Lord Eldon held that the majority of a corporation organized for the purpose of carrying on the business of fire insurance could not authorize the company to deal in marine insurance, and that the company would be enjoined from so acting at the suit of any dissenting shareholder. In the case of *Livingston v. Lynch* (4 Johns Ch. 573), an injunction was granted to restrain a steamboat company from acting through an agent whose authority, although derived from the majority, was inconsistent with the charter agreement, and the Court said: "Where it is declared in one of these (charter) resolutions, prescribing the duties of the secretary, that he was to see that the resolutions of a majority of the interest of the concern be carried into effect, it

certainly could have referred only to resolutions passed in the ordinary transactions of the concern, and in perfect subordination to all and each of those articles of the original compact." And in *Pickering v. Stephenson* (L. R. 14 Eq. 340), it is said: "* * * The special powers, given either to the directors or to a majority, by the statutes or other constituent documents of the association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association. This is not a mere canon of English municipal law, but a great and broad principle which must be taken, in absence of proof to the contrary, as part of any given system of jurisprudence."

In applying this general rule it will be found that the classes of cases which come under its control are several, and it will be necessary briefly to examine these in order.

By-Laws.—In the first place to facilitate the attainment of the corporate purposes it is essential that a system of by-laws should be adopted, regulating the government and business methods of the company. In so far as they are reasonable and tend to effect these purposes by-laws adopted by the majority are binding on the corporation, and their right to make them rests on the implied agreement of the shareholders in forming the company. But any such rules, inconsistent with the original agreement which is the fundamental rule of the company, or which are injurious to the interests of the concern, or are unreasonable or contrary to the general principles of the law, it is, in accordance with our rule, beyond the power of the majority to thrust upon the corporation."⁷

Appointment of Agents.—As it is necessary that in its business transactions the corporation should be represented by agents, it is impliedly agreed in the charter contract that such agents should be appointed. Hence, their appointment being within the limits of the charter powers, it is also, in accordance with our rule, impliedly agreed that the majority may select and confer authority upon such agents as may be necessary, and their choice in this matter will bind the company.

Ratification.—Not only may the majority bind the corporation by its own acts within the limits laid down in the general doctrine, but it may also exert the same power by way of a ratification of unauthorized acts of its agents. Hence, it follows that

⁷ *Bank v. Lanier*, 11 Wall. 369; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 182.

an act of an agent outside of the scope of his authority may by vote of the majority be made binding upon the corporation. But it also follows that this power of ratification has the same limitations as the primary power of the majority and hence no act of an agent which is beyond the limits of the charter can be made effective.

Alteration of Charter.—To materially alter the terms of the charter is clearly an act which is beyond the purpose of the charter agreement, unless therein otherwise stipulated. Hence, our rule would prevent the acceptance of such alteration by a majority.⁸

Thus in a number of cases where railroad corporations have been authorized to extend their lines further than was contemplated in the original agreement, it has been held that such an amendment was a material alteration of the charter which could not be accepted by the majority. This also covers all that class of cases in which the consolidation of two or more corporations with the legislative authority is attempted by the majority. In fact, the majority cannot accept an amendment authorized by the legislature, even if by the same act the power so to do is placed in their hands. For to hold that legislative enactment could confer such power on any part of the stockholders would be to admit that the Legislature could impair the obligation of the contract embodied in the charter.

Transfer of all Corporate Property.—To sell out all the property and privileges of a corporation is an act which is consistent with the purposes of its charter, when it is made necessary by the condition of the concern, as where the business has become unprofitable, and hence, it is within the powers of the majority to bind the corporation by a sale under such circumstances.⁹ But a transfer effected by them while the affairs of the concern are prosperous, whether for a purpose beneficial to the stockholders or not, is invalid,¹⁰ and at the suit of a stockholder an injunction will be granted to prevent such transfer, and if it has already been completed it will be declared void and an accounting will

⁸ *Stevens v. R. R.*, 29 Vt. 546; *Hartford, etc., R. R. v. Crosswell*, 5 Hill 385; *New Orleans R. R. v. Harris*, 27 Miss. 517; *Pickering v. Stephenson*, L. R. 14 Eq. 322; *Turnpike Co. v. Phillips*, 2 Penn. Rep. 184; *Turnpike Co. v. Locke*, 8 Mass. 268; *Turnpike Co. v. Swan*, 10 Mass. 384; *Union, etc., Co. v. Towne*, 1 N. H. 44.

⁹ *Kean v. Johnson*, 9 N. J. Eq. 401; *Revere v. Copper Co.*, 15 Pick. 231.

¹⁰ *Taylor v. Earle*, 8 Hun. 1; *Albert v. Rubber Co.*, 33 Barb. 578; *People v. Ballard*, 134 N. Y. 269; *R. R. v. Allerton*, 85 U. S. 233; *Kean v. Johnson*, 9 N. J. Eq. 401.

be decreed.¹¹ In the words of the Court in *Kean v. Johnson* (9 N. J. Eq. 408), "To sell the road, to abandon the contemplated investment and embark in another scheme, whether entirely different, or only more extensive than the original contemplation as apparent on the face of the charter, is, as it seems to me, clearly contrary to the rights of the individual stockholder. If they had any rights as partners or beneficiaries it would seem to be this, that their money should be devoted to that use, and never employed in any other, nor returned to them before they desire it. The mere statement of the proposition seemed to me to prove it. No argument, however lengthened, can add to the force of the naked position."

Majority Itself an Agent.—From a consideration of the different varieties of cases, to which, as we have seen in this brief summary, the general doctrine applies, the fact becomes apparent that the majority is itself in reality simply an agent of the corporation—an agent deriving its authority from the implied agreement of the charter contract of the members, and the scope of whose powers is limited by the terms of that contract. This view of the functions of a majority has been taken in many cases, and seems to give a comparatively simple test of the extent of its powers. Accordingly it would seem a necessary consequence of the laws of agency that our rule must be qualified to a certain extent and so extended as to admit that the majority may bind the corporation in all matters within the *apparent* scope of its authority. This qualification, however, will readily be seen to be of no force as the charter determines the scope of that authority, and persons dealing with the corporation must take notice of the charter. Hence, its apparent powers can be no more than those laid down in the charter, and the terms of the latter must still be the deciding test.

As a further result of the application of the laws of agency as applied to the power of the majority, it follows that where the latter has transcended its authority its acts may still be made binding through ratification by the whole number of stockholders.

Restrictions on General Rule.—Although, as is seen from the cases already reviewed, the doctrine as stated has been thoroughly established, still in the greater number of corporations the power of the majority will be found to be actually much more strictly confined, in most cases extending only to a general oversight of the affairs of the company and to the appointment of its agents,

¹¹ *Ibid.*

while all other matters are delegated to the agents thus appointed. This limitation, however, can be easily reconciled with the general rule, for it will be found that, wherever such a restriction exists, it is invariably provided for by the express terms of the charter itself, which as we have seen must be in all cases the ultimate criterion of the powers of the majority. The majority then being but an agent itself can have no control over matters in the province of the other agents nor can it bind the corporation in matters placed by the charter in other hands. Bearing this in mind, the many decisions which hold that corporations can do no acts except through their directors, while apparently in direct opposition to the rule in question, will be seen to be in reality perfectly compatible with it. For in each of those decisions it will be found that the charter of the corporation in question contained some express stipulation imposing this limitation upon the majority. Such restrictions, therefore, instead of being, as they would at first sight appear, exceptions to the rule, are, as a matter of fact, simply the logical results of its application.

Majority a Trustee.—There remains one further limitation which arises under certain circumstances and which is not simply apparent as was the last. It is to the effect that a sale of corporate property effected by a majority to itself cannot, unless made in the utmost good faith, be valid as against a dissenting stockholder, however proper such sale might have been to any third party. This restriction is entirely independent of the doctrine expressed in our general rule and arises from the fact that the relation between the majority and a stockholder is that of a trustee to a *cestui que* trust, and the general principles applicable to that relation must control in this case. This view of the position of the majority is expressed by the Court in *Erwin v. Oregon Ry. & Nav. Co.* (27 Fed. Rep. 631), in these words: "Where a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by a corporation towards its stockholders. * * * The corporation itself holds its property as a trust fund for the stockholders, who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and *cestui que* trust."

III.—POWER OF STOCKHOLDERS ACTING UNANIMOUSLY.

Having thus disposed of the power of the individual stockholder and of the majority, there remains the final division of our

subject—the power of the stockholders acting unanimously. An act of all the members in their corporate capacity is an act of the corporation itself. Hence this division of our subject embraces simply the question as to the power of the corporation to bind itself. It is no longer a matter of the power of the stockholders, but involves the whole doctrine as to the so-called *ultra vires* acts. A discussion of this theory is entirely beyond the scope of this article. Suffice it to say that the rule applying to a majority does not extend to the action of the whole membership. While no mere majority however large may transcend the limits laid down by the charter, it is otherwise with the stockholders acting unanimously, for many of their contracts and actions will be sustained even though entirely without the scope of the charter purposes. It is readily seen why such acts should be binding in so far as they are not nullified by the intervention of other principles of law. The charter was created and exists only by the unanimous agreement of the stockholders. Hence it may be altered or entirely repudiated by any subsequent unanimous agreement on their part, and as among themselves they will be bound by any action in pursuance of such an agreement, however alien it may be to the terms of the original charter. But it is just at this point that the general principles of the law and of public policy intervene and determine which of these acts shall be deemed valid and which of no effect. The rules governing this determination can be ascertained only from a study of the doctrine of *ultra vires* powers.

It is no doubt true that for a complete discussion of the subject originally undertaken an examination into the doctrine of *ultra vires* would be necessary. But so extensive is this doctrine, and the results dependent upon it, that it should more fitly be treated as a matter entirely independent of the subject in hand. Hence, with the consideration of the first two divisions of our subject, as laid down at the outset, we may consider the discussion concluded.

W. Lloyd Kitchel.

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THE Fifty-fourth Congress begins its first session under peculiarly interesting conditions. The country is slowly recovering from the effects of a long period of financial and commercial depression. Confidence is not so fully restored that it may not be easily disturbed by threatening influences. The continued depletion of the gold reserve, in spite of repeated bond issues, has been one of the most potent causes of distrust. Unless some remedy is provided there seems to be no reason to hope that this state of things will not continue indefinitely. In his annual message to Congress the President asserts that the cause of the difficulty is the retention of the legal tender notes and the "Sherman law" certificates as part of our national currency, and suggests as a remedy the issue of bonds for the purpose of retiring these obligations. The members of the majority party in Congress, however, claim that the principal cause of the Treasury's unfortunate plight is the fact that the national revenues have fallen short of the expenditures, the present tariff law having proved a failure for the purpose of raising adequate means to meet the requirements of the Government, and that relief lies in an increase of tariff rates. Probably the present condition of the Treasury is due to a combination of both causes. The contraction of the currency consequent upon the retirement of the "greenbacks" unless some sufficient provision is made for a substitute, and the evident desire of the commercial interests for as little tariff agitation at this time as possible, are important considerations in devis-

ing a remedy. The problem is not an easy one and should call forth the earnest and united efforts of both the executive and legislative departments for its solution. There is opportunity here for the exhibition of a high order of statesmanship, and for the display of a very low degree of partisanship on both sides. Even from the standpoint of the practical politician, it would seem that the exercise of the former quality at a critical time should not necessarily be fatal to a party record for campaign purposes.

* * *

AMONG the questions which demand the instant attention of the Fifty-fourth Congress, the old problem of the debt of the Pacific railroads to the Government takes a prominent place. One Congress after another has played with this vexed subject and has dropped it in despair. Unfortunately the difficulty has accumulated in this process of postponement from year to year, until finally the day of reckoning seems to have arrived and the present Congress has the last chance to take effective action. If they fail to do this now, outside forces will soon sweep the whole matter out of their control.

The possibilities of the situation are clear enough. The claim of the Government, which represents subsidy bonds issued to aid in the construction of the road together with vast arrears of interest, is secured by a second mortgage on the properties. Prior to this there is a general first mortgage of a like amount, which is now in default. Foreclosure proceedings are being pressed by these first-mortgage holders, and the Government has now three alternatives. It may proceed to foreclose its mortgage, pay off the prior mortgage, and take the road in its hands to try its first experiment in railroad ownership and operation—a result which would delight our Populist statesmen. In the second place the Government may sell its claim in open market, thus receiving a lump sum in cash and forever ending its relations with the railroads. But the Government may also stand idle, as it has done for years past, watching things take their course, and thus lose its whole claim. These possibilities of the situation were vividly presented to the last Congress, and one of the latest discussions of that famous body was upon this very topic. Instead of taking the chance then offered of saving its claim by a compromise, the members of the House threw the whole matter away in bad temper. The debate took a highly moral tone, the old "Credit Mobilier" scandals were raked over, and the speakers held up their hands in melodramatic horror at the mere notion of any sort

of compromise. But we have nothing to do now with the sins of men who are all dead or out of reach of process. The Government must not throw its claim away for sentimental motives. It is, therefore, to be devoutly desired that Congress decide immediately to sell its claim for what it may bring, and end the troublesome business once for all. At any rate we seem to have at last reached the closing chapter of this picturesque and not over clean history.

* * *

THERE is an increasing tendency among law students to combine their duties in the Law School with office work. Usually their object is to acquire a firmer grasp of the principles taught in the School by practical application and to become familiar with the general routine of a law office. Certainly the desire to master the principles of law is commendable but the means adopted are questionable. The clerk in the average office may become acquainted with legal documents, acquire certain readiness in the application of principles to facts and a knowledge of the preparation of cases. He picks up many things which are as yet unknown to his less experienced classmate whose lessons are not prepared under the inspiration of the bustle and activity of a law office. But results have shown that this rapid development is often at the expense of a firm foundation. A two-years course necessarily including many subjects, requires incessant reading which can hardly be expected from the clerk whose time is continually interrupted by office duties and whose attention is diverted by the confusion of business. Even the practical work, deemed so valuable, is unsystematic and seldom in harmony with his logically arranged studies, which are injured as a whole if neglected in any part. In short, it requires an exceptional amount of talent and diligence to meet at the same time the requirements of a valuable clerk and a faithful student. The outcome is too often a superficial knowledge, and a thorough and systematic legal education sacrificed for the sake of this so-called "practical" law. The study of the Law is the study of a science, the elements of which must be mastered as the basis of a profession. All that interferes or detracts should be abandoned.

* * *

THE JOURNAL congratulates Yale debaters on the victory of December 6th. It reflects credit both on the speakers and on those who prepared them. Debating at Yale is, however, still in a formative stage, and we can profitably copy Princeton's style of forensic oratory.

COMMENT.

An important decision has been rendered in the case of *Bradley et al. v. Fallbrook Irrigation Dist. et al.*, 68 Fed. Rep. 968, by Ross, J., of the Circuit Court for the Southern District of California. This was a suit in equity to enjoin the execution of a deed of certain land of the complainant, given by the collector of the defendant irrigation district under a sale to satisfy a delinquent assessment against the said property, levied under the provisions of the so-called "Wright Act" of the State of California (St. 1887, p. 29; St. 1889, pp. 15-18, 212, 213; St. 1891, pp. 53, 142, 145, 147, 244), providing for the organization and existence of irrigation districts, and to obtain a decree adjudging the proceedings under that legislation void and of no effect.

The regularity of the proceedings under the act was not questioned but the ground of the suit was the alleged unconstitutionality of the Wright Act itself, it being contended that it conflicted with certain provisions of the Constitution of the State of California and also with that provision of the Constitution of the United States which declares that no person shall be deprived of his property without due process of law, and moreover that the act provided for the taking of private property for private use. The defendant demurred on the ground that similar objections had been raised to this legislation in other cases and that the validity of the Wright Act had been determined by the Supreme Court of California (*Irri. Dist. v. Williams*, 76 Cal. 360; *Irri. Dist. v. DeLappe*, 79 Cal. 352. *In re. Madera Irri. Dist.*, 92 Cal. 296). Judge Ross holds that, "While the decisions of that Court in those, as well as in all other cases are justly entitled to great respect, this Court is not at liberty to decline to exercise its own independent judgment in determining whether any State legislation violates a provision of the Constitution of the United States." The solution of these questions must be sought not in the decisions of a single State tribunal but in the general principles common to our courts (*Olcott v. Supervisors*, 16 Wall. 678). Nor does a legislative declaration that a use is a public use necessarily make it so (Cooley, Const. Lim., 5th Ed., p. 666, and cases cited). The character of a use is not to be tested by the number of persons who enjoy it, and no man's property can be taken from him without his consent and given to individuals for their own use, no matter how numerous they may be, nor can it be taken on the mere ground that the public good would be thereby advanced. A

public use implies a possession, occupation, and enjoyment of the land by the public at large, and the same objection is valid in this case as in *Cummings v. Peters*, 56 Cal. 593, "that the use of the water is limited to specific individuals" (*i. e.*, those holding land in the irrigation district) "and the interest of the public is nothing more than that indirect and collateral benefit that it derives for every improvement of a useful character that is made in the State."

A fatal objection to the maintenance of the legislation under the right of eminent domain, is that, if it is to be regarded as undertaken by the public primarily as a matter of public concern, the assessment upon the land owners must be limited to the benefits imparted, which is not the case with this statute (*Wurts v. Hoagland*, 114 U. S. 613; *Tide-water Co. v. Coster*, 18 N. J. Eq. 527). If the act is to be maintained at all it must be under the power of assessment for local improvements, but there is no reason why this power more than any other can be exercised without "due process of law." And as the whole scheme of irrigation as to that district was experimental, it is arbitrary and unjust to take a man's property "without affording him any opportunity to show the insufficiency of that very thing which forms the basis of the proceedings under which the taking is to occur." The fact that vast sums of money have been invested in works constructed in pursuance of this legislation and that millions of bonds have been issued and sold, and that the validity of this legislation has been several times sustained by the Supreme Court of California, "while demanding on the part of this Court great care and caution in the consideration of the case can not justify it in failing to declare invalid legislation which, in its judgment, violates those principles of the United States Constitution which protects the private property of every person against forcible taking without due process of law. * * *

Judge Ross concludes: "Unfortunate as it will be if losses result to investors, and desirable as it undoubtedly is, in this section of the country, that irrigation facilities be improved and extended, it is far more important that the provision of that great charter, which is the sheet anchor of safety, be in all things observed and enforced." The demurrer was overruled. [This subject will be further discussed in an article by W. P. Aiken, Esq., of the New York bar in the February number of the JOURNAL.]

* * *

An interesting question is involved in the recent case of *Schillings v. United States* (155 U. S. 163), as to the liability of

the United States to be sued for the infringement of a patent. The plaintiff secured a patent for an improvement in the preparation of concrete pavement. While the patent was still in force, the United States through its official architect constructed walks and drives about the Capitol with the patented article without the plaintiff's permission or without making him any compensation. The plaintiff brought suit for damages. The Supreme Court of the United States held that he could not recover on the broad principle that the Sovereign cannot be sued without his consent and that the Court of Claims had no jurisdiction in an action against the United States for torts. But the law was stated otherwise in the dissenting opinion of Mr. Justice Harlan. He proceeds upon the rule that the plaintiff as the injured party had a right to waive the tort and bring action upon an implied contract. The proceedings then might properly be submitted before the Court of Claims. Further, that all claims founded upon the constitution are within the jurisdiction of the Court of Claims and that this was such a claim, since the Constitution forbids the confiscating of private property for public use without making fair compensation.

* * *

The law governing the relation of railroads and telegraph companies has just received a most important addition by the decision of the United States Supreme Court given out on November 26th, in the case of the *United States v. The Western Union and the Union Pacific*. The question involved is the validity of certain contracts between the railroad and the telegraph company by which the latter has been given the exclusive right of way and of telegraphic operation over the lines of the railroad. The case made its first appearance in the Circuit Court in Nebraska (50 Fed. Rep. 28), where the Government attacked these contracts on the ground that the railroad, which owned its telegraphic franchises by grant from the United States had failed in its duty to the Government by transferring its telegraphic obligations to the Western Union. Judge Brewer upheld the Government's attack, but his decision was reversed by Judge Thayer in the Circuit Court of Appeals in January, 1894 (59 Fed. Rep. 813). The Government took the case to the Supreme Court, which has now ruled that these contracts, giving exclusive rights of operation to one telegraph company, are invalid and must be cancelled. The exact ground of this decision is that these contracts directly conflict with the provisions of the Post Road Statute of July, 1866, under which any telegraph com-

pany, which accepts the Act, is given the right to erect its plant along any post road of the United States, and the term includes every railroad in the country. Practically all of our telegraph companies have accepted this statute, so that the ruling is decisive as to the invalidity of all such exclusive contracts between such companies and the railroads. The question never has been, and practically never can be, decided wholly independently of this statute, but there are parts of the present opinion which base the objections to such contracts on the broader grounds of public policy, and indicate that the agreements are inherently bad. Under present conditions this decision necessarily will have the widest effect on telegraph companies, which have entered into so many of these agreements, because there is nothing to prevent the railroads from avoiding these contracts as they see fit. But the case has a still wider interest as showing what a risky business it is for corporations, however powerful they may be, to make legislation in their own favor. The Post Road Statute was literally the creation of the Western Union Telegraph Company, and was thought to bring with it immense gains, to which no harm could be added. This was done thirty years ago. To-day this very statute has proved a successful means of destroying some of the most valuable privileges of the company that framed it. The moral of this piece of legal history is very plain and not far to seek.

RECENT CASES.

Accident at Railroad Crossing—Failure to Give Signal.—Durkee v. President, etc., of Delaware and H. Canal Co., 34 N. Y. Sup. 978. The repeal of a statute requiring signals to be given by a locomotive approaching a highway crossing does not relieve a railroad company from giving such warnings as would afford reasonable notice to travelers of the approach of a train.

Admiralty Jurisdiction—Torts Committed partly on Land and partly on Water.—Herman v. Port Blakeley Mill Co., 69 Fed. Rep. 646 (California). This was a case of mixed tort committed partly on land and partly on water. The plaintiff was injured by the negligence of a fellow workman, who, without warning, slid a beam through a chute from a landing above to a vessel below upon which plaintiff was working. The defendant denied the jurisdiction of the court in the case, claiming that as the origin of the injury was on land all the consequences resulting from the act should be drawn after it. In cases of tort locality is the test of the jurisdiction in the admiralty. The locality of the injury is the place or locality of the thing injured and not of the agent causing the injury. Therefore the court had jurisdiction in this case.

Attainder of Felony—Parricide—Right to Inherit Father's Estate.—In re Carpenter's Estate, 32 Atl. Rep. 637 (Penn.). A son murdered his father for the purpose of obtaining immediate possession of his share of the estate, the widow becoming an accessory after the fact, and they afterward conveyed their interests in the estate to the attorneys who defended them in a prosecution for murder. It was held that the act of murder did not, in the absence of a will, destroy the son's right to immediate possession of his share.

Bank Deposits—Transfer—Creation of Trust.—Cunningham v. Davenport (Public Administrator), 41 N. E. Rep. 412 (N. Y.). A bank depositor opening an account in the name of or in trust for another creates no trust in favor of that party if he retains the bank book which is evidence of right to draw the deposit and does not inform the beneficiary of the account. But in case the depositor dies before the beneficiary leaving the

account open and unexplained it will be conclusive evidence and will establish the validity of the trust.

Bequest to Charitable Uses — Construction — Validity. — *People v. Powers*, 41 N. E. Rep. 432 (New York). A bequest of property to be disposed of among "charitable and benevolent institutions or corporations" in a city is void for uncertainty as to the beneficiaries. Charitable institutions such as orphan asylums and the like are one class; benevolent associations such as Ancient Order of United Workmen, with numerous others of like character, form another class, while unincorporated institutions would include sewing societies and like organizations found in nearly every circle of society. Difficult if not impracticable to ascertain beneficiaries, and therefore the gift is incapable of being executed by judicial decree.

Carriers—Liability Not Limited—Interstate Commerce.—*Solan v. Chicago, M. & St. P. Ry. Co.*, 63 N. W. Rep. 692 (Ia.). The plaintiff was injured while in charge of cattle on the train of the defendant. The contract of shipment provided that the liability of the company for such an injury should be limited to \$500. The court held that under section 1308 of the Code a corporation could not limit its liability as a common carrier by contract, and that this section of the Code was not a "regulation of interstate commerce," and did not therefore encroach upon the federal jurisdiction as contended by the defendant.

Carriers—Contract with Agent of Shipper—Limitation of Authority.—*Smith v. Robinson Bros. Lumber Co.*, 34 N. Y. Sup. 518. A shipper of lumber acting as agent for an undisclosed principal contracted with a transportation company to carry a cargo of lumber from Ontonagon to Sandusky, at \$2.50 per thousand, that price being the amount of freight authorized to be paid by the instructions of the principal. While the cargo was being loaded, the agent finding no sales for lumber at Sandusky, directed the master of the vessel to take the cargo to Tonawanda on consideration of the payment of extra freight. Held, that a carrier contracting with the agent of the owner of goods for their transportation, is not affected by a limitation of the agent's authority to agree on the terms of transportation, but can recover a reasonable compensation therefor.

Contracts—Illegality—Collusive Bidding.—*McMullan v. Hoffman*, 69 Fed. Rep. 509 (Oregon). Two bidders on public works enter

into secret contract to avoid competition and to combine their bids in such way as to secure higher price for work and then to divide profits, while appearing to bid against each other. One of the parties was awarded the construction of the public works and executed the same and received the profits. The other party now sues for partition of such profits according to contract. The Court held such a contract illegal and refused relief.

Contract—Subscription—First M. E. Church in Ft. Madison v. Donnell, 64 N. W. Rep. 412 (Iowa). A subscription paper to a church fund, containing an unqualified promise to pay, was read to the congregation. The defendant announced the amount of her subscription, and it was placed on the list by an official of the church with her knowledge and consent. Held, that the defendant's subscription so obtained constituted a contract in writing and that the defendant was bound thereby.

Corporations—Use of Electricity by Illuminating Companies—Regulation by Cities.—State ex rel. Laclede Gas Light Co. v. Murphy, 31 S. W. Rep. 594. An illuminating company substituted electricity for gas for lighting purposes. It was held that, as the company's charter had been granted before electric lighting was known, and general police power had been afterward granted to the city, the company must exercise its rights subject to city ordinances relating to underground wires in the streets.

Due Process of Law—Membership in Labor Union—Special Legislation.—State v. Julow, 31 S. W. Rep. 781 (Mo.). A statute which makes it unlawful for an employer to require his workmen to withdraw from trade or labor unions is unconstitutional. No state may deprive any person of life, liberty or property without due process of law. These rights carry with them all the attributes necessary to their complete and unrestrained enjoyment one of which is the right of an employer to make and terminate a contract when he pleases. This statute is special legislation as well for it refers not to workingmen as a class, but to those merely who belong to an organization, and are a particular portion of the class.

Injunction—Removal of Wall.—Norton v. Elwert, 41 Pac. Rep. 926 (Oregon). When the boundary line between adjoining lots for a space fifty feet in length and one and one-half in breadth was in dispute, and one owner had commenced the erection of a building the north wall of which covered the disputed territory,

complaint was filed by the other claimant of the disputed ground; and a mandatory injunction sought to compel the removal of the wall and for damages. The question of boundary having been referred and found in favor of the plaintiff, it was held, that a perpetual injunction would lie to compel the removal of the wall without resort to law to determine title, the title and right of possession being incident merely to the question of boundary.

Liabilities of County Commissioners.—*Warden v. Witt et al.*, 39 Pacific Rep. 1114 (Idaho). The plaintiff brought suit against the defendants as commissioners of a county for injuries alleged to have been sustained by him in crossing a certain county bridge, by reason of defects in the same. It was held that a County Commissioner is not individually liable in damages for injuries sustained because of defective highways, for the reason that it would result in the abrogation of the office (because no sane man would assume the position with such a liability attached).

Liability of Wharfingers—*Fire Communicated to vessel by floating oil.*—*Hustede et al. v. Atlantic Refining Co.*, 68 Fed. Rep. 669. A vessel on its way to an oil wharf where the water is of necessity covered with oil, caught fire, and suit was brought against the wharfinger to recover damages resulting therefrom. Held, that the wharfinger was not liable for the damage done, as the vessel had to take its own risk in going to the wharf, and the wharfinger was not responsible for the escape of oil from sources over which he had no control, nor liable for fire communicated by the oil from premises not owned by him.

Marriage—Divorce—Conflict of Laws—Foreign Judgment—Jurisdiction.—*McCreery v. Davis*, 22 S. E. Rep. 178 (S. C.). Plaintiff sued to compel acceptance of deeds to land by defendant, who refused upon the ground that the title was defective in that the deeds were not signed by plaintiff's wife. Plaintiff's wife had secured a divorce in Illinois, without personal service on her husband, upon grounds not recognized in New York where the marriage took place, nor in South Carolina where the plaintiff lived. Held, that marriage is a civil contract, not a *res* or status; that the common-law doctrine of divorce obtains in South Carolina; and that the wife still had a dower in the lands, hence her signature was necessary to create a perfect deed.

Powers of Congress—Postoffice—Lotteries.—*Enterprise Lot. Assn. v. Zumstein, P. M.*, 67 Fed. Rep. 1000 (Ohio). The complainant

brought a bill to enjoin the postmaster of Cincinnati from obeying an order of the Postmaster General directing him to refuse to deliver registered letters or pay money orders to the plaintiff. This order was issued under the power imposed in the Postmaster General by Congress, upon satisfactory evidence that the plaintiff corporation was engaged in conducting a lottery. The Court held that it was within the power of Congress to authorize the Postmaster General to make such an order, and that it had no jurisdiction to enjoin the execution of an order made thus by the Postmaster General in the exercise of the discretion which Congress had reposed in him.

Sale of Land to Minor—Rescission at Majority—Lien for Price Paid.—Morris v. Holland, 31 S. W. Rep. 690 (Texas). The appellant in this case sought to rescind a conveyance of real estate made to him during his minority by appellee, and to recover the money paid, upon a tender to the vendor of a reconveyance, a lien upon the land was implied and need not be pleaded where the facts show its existence.

Taxation—Charity School.—City of Philadelphia v. Overseers of Public Schools, 32 Atl. Rep. 1033 (Penn.). An institution originally endowed as a charity school to educate poor children gratuitously and those of rich parents at reasonable rates, gradually ran down. The overseers then agreed to furnish the buildings, furniture, etc., and to pay the tuition of the poor children from the corporation's funds, and contracted with a teacher to conduct the school, stipulating that he should receive seven-eighths of the gross receipts and out of this hire his assistants. Held, that since the element of charity was eliminated by leasing the school to the head teacher for one-eighth of the gross receipts, the property was not exempt from taxation.

BOOK NOTICES.

Law of Torts (2 vols.). By Edwin A. Jaggard, LL.D., Professor in the Law School of the University of Minnesota. West Publishing Co.

This new work contains a development of the general Law of Torts. It has been the aim of the author to apply to the subject the broad principles of jurisprudence. Instead of discussing the law of particular or isolated torts he has used the specific wrongs as an illustration of the general principles. Accordingly the first volume is devoted to the discussion of the General Nature of Torts, Right to Sue, Liability for Torts Committed by Others, Discharge, Remedies, Safety of Persons, Family Relations, Regulation and Malicious Wrongs. In the second volume his subjects are more specific, such as Wrongs to Property, Nuisance, Negligence, Master and Servant and Common Carriers. The book contains contributions from the best authorities upon the subject and many recent cases are cited. In view of the quantity and diversity of accumulating decisions this work ably answers the demand for a corrected classification of the law.

The American Digest for 1895, issued by the West Publishing Co., of St. Paul, has lately made its appearance.

This stupendous work contains a digest of all decisions rendered between September 1st, 1894, and August 31st, 1895, in all the courts of the United States, the Courts of last resort of all States and Territories, the intermediate courts of New York, Pennsylvania, Ohio, Illinois, Kansas, Missouri, Texas and Colorado, and the Court of Appeals and Supreme Court of the District of Columbia. It contains in addition notes on English and Canadian cases, a table of cases digested, and a complete and valuable table of cases overruled, criticised, followed and distinguished during the year. This work is compiled and edited by the editorial staff of the National Reporter System and is the ninth of their annual series of digests. The volume itself is handsomely and substantially bound and contains five thousand four hundred and forty-seven pages of closely printed matter, the typography of which is of the highest order. The greatest recommendation which can be given to this publication is the ease and facility with which decisions covering a point in controversy can be found.

Hall's Infringement Outline. By Thos. B. Hall, of the Cleveland Bar. Cloth, price, \$1.00. Banks & Bros., New York, 1895.

The object of this book is to give in a clear but concise form an outline of the doctrine touching infringement of patents for inventions. Its pages bring out in a comprehensive way, the fixed points on this intricate subject. The author has divided the contents of the book into four divisions or subjects, as follows: (1), License under Patent; (2), Identity of Invention; (3), Validity of Patent; (4), Recovery for Infringement. Each classification is subdivided into the several topics which belong to its particular class, thus enabling the inquirer to readily find the particular point sought after. In addition to the above, there is a most valuable citation given under thirty-five divisions of all cases of the Supreme Court of the United States, thereon, down to April 20, 1895. All in all, this book, as a summary of established points and valuable citations, certainly attains the end at which its author aimed.

The Constitution of the United States at the End of the First Century. By George S. Boutwell. Price, \$3.50. D. C. Heath & Co., Boston, Mass.

The purpose of the author of this book is to set forth the Constitution of the United States, as it has been interpreted by the Supreme Court decisions of a century. The author's plan is simple. The first portion contains the organic laws of the United States before the adoption of the Constitution, and the Constitution itself with the decisions of the Supreme Court cited each under its appropriate section and clause. The remaining portion of the book is devoted to a short history of the causes leading up to the adoption of the Constitution, followed by an examination of the more important decisions upon each paragraph of it. Great care is taken in the analysis of those cases which lay down the line between State and National sovereignty, and here the book is particularly of value to the student of our history and Constitution. As a work of reference it cannot be surpassed, and should be in the hands of every lawyer.

Restraints on the Alienation of Property. By John Chipman Gray, Royal Professor of Law at Harvard University. Second edition. Cloth. Pages xix., 309. The Boston Publishing Company, 1895.

To what extent conditions and conditional limitations on the alienation of property will be valid, and how far a person may be restrained in alienating his own property are questions of interest

and importance. As long as there are debtor and creditor classes these questions will arise. In the present work the author has made a thorough examination of the law on the subject of Restraints on Alienation. He has carefully collected and examined the cases of this country and of England that bear upon the subject. The points are brought out concisely and clearly and the authorities are cited pro and con. It is the intent of the author to show that the doctrine of spendthrift trusts has no place in the system of the common law. The whole subject of Restraints on Alienation, however, is discussed and the tendency of the law to remove restraints and favor the alienation of property is traced from the time of Magna Charta down to the decision of Mr. Justice Miller, in *Nichols v. Eaton*, 91 U. S. 716. The change, due to that decision and the spirit of the times, which has resulted in the last few years in what was looked upon as settled law is clearly pointed out. The author divides the subject into two general heads—Forfeiture for Alienation and Restraints on Alienation—and under each, the effect of restraining provisions and conditions upon estates in fee, in fee tail, for life, and for years, is discussed and the authorities given. Important cases are cited at length and special attention is devoted to restraints on the Alienation of Life Estates. The decisions under the statutes in the different States are given in the appendix, while a brief summary shows at a glance what restraints are valid and what void, with the exceptions. The work is such an one as lawyers will appreciate.

Elements of the Law of Agency.—By Ernest W. Huffcut, Professor of Law in Cornell University School of Law. Cloth; 249 pages. Price, \$2.50. Little, Brown & Company, Boston, 1895.

In this book the author treats in a most concise and clear manner the important subject of agency. Like all its predecessors in the Student's Series, the topics and headings in this book are so systematically arranged that one may readily find the particular topic he is seeking. Under the several headings of each topic is a brief statement of what the rule of law is regarding that particular point. This statement is followed up and enlarged on by the author so that the explanation brings out clearly that special rule of law. Directly preceding the introduction is the table of cases to which the reader is referred. All in all, the work is worthy of strong recommendation to the student for its practicality and the reader cannot fail to be much benefited by the knowledge of the law of agency he will derive therefrom.

MAGAZINE NOTICES.

The Green Bag, December, 1895.

Alexander Hamilton, the Lawyer,	.	.	.	A. Oakley Hall
Legal Reminiscences,	.	.	.	L. E. Chittenden
The Great India Rubber Case,	.	.	.	Andrew Dutcher
The Supreme Court of Maine: III.,	.	.	.	Chas. Hamlin
A Wager About Napoleon.				
The Opening of Parliament.				
The Lawyer's Easy Chair,	.	.	.	Irving Browne

The Albany Law Journal, 1895.

Oct. 5.	The New Constitution of New York in Relation to Prison Labor,	.	.	W. P. Prentice
Oct. 12.	Private Corporations,	.	.	Hon. Warren M. Bateman
Oct. 19.	Is There a Federal Common Law?	.	.	Wm. Hepburn Russell
Oct. 26.	Annual Address before the Incorporated Law Society at Liverpool, England,	.	.	J. Wreford Budd
Nov. 2.	"One Law for the Rich and Another for the Poor."			C. H. Pickstone
Nov. 9.	Opinion in People of New York v. Commissioners of Taxes and Assessments of New York City.			
Nov. 16.	Address of James C. Carter, President of the American Bar Association.			
Nov. 23.	Address of James C. Carter (concluded).			

Central Law Journal, 1895.

Sept. 27.	How Jurisdiction May be Acquired in a State Court Over a Foreign Corporation,	.	.	Frank E. Loughran
Oct. 4.	The Suicide Clause in Life Policies,	.	.	Ward B. Coe
Oct. 11.	The Origin and Use of the Common Seal,	.	.	W. M. Vaughan
Oct. 18.	Liability of Corporations for Exemplary Damages,	.	.	Seymour D. Thompson
Oct. 25.	Abstracts of Title,	.	.	Percy Edwards
Nov. 1.	The Next Friend—Extent of Authority to Compromise Suit,	.	.	Cyrus J. Wood
Nov. 8.	Proof of Handwriting,	.	.	D. M. Wickey
Nov. 15.	Construction of Writings—Restriction of General Terms by Particular Recitals,	.	.	William O. Murfree, Jr.
Nov. 22.	Injunction to Restrain Proceedings Under a Void Judgment,	.	.	Jas. L. Hopkins
Nov. 29.	Individuality in Trade Devices,	.	.	C. A. Bucknow

The Counsellor, October, 1895.

To What Extent are Prospective Profits Recoverable as Damages in an Action upon Contracts,	.	.	.	Frederick Hulse
Rights of a Common Carrier to Limit its Responsibility by Special Agreement,	.	.	.	Romaine H. Crosby
Telegraph Law in New York,	.	.	.	Theodore F. Humphrey

November, 1895.

Address at the Opening of the College of Law at Syracuse University,	.	.	.	Wm. L. Hornblower
Suggestions as to the Study of Law,	.	.	.	Prof. George Chase

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VOL. V

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THE LEGAL PROFESSION IN SCOTLAND.

I. THE JUDICATURE.

The Judges in Scotland, like those in England and elsewhere, belong to two classes, the salaried and unsalaried, but it is characteristic of the Scottish system that in it the unsalaried are of comparatively little consequence. The salaried judges do practically the whole judicial work of the country, and of them accordingly I shall have most to say. It will simplify matters if I begin by stating some points common to all of the salaried judges in Scotland, whether they belong to the Supreme or inferior courts.

All salaried judges in Scotland are appointed *ad vitam aut culpam* and are removable only with great difficulty for misconduct. The judges of the Supreme Court cannot be removed except upon an address presented to the Sovereign by both Houses of Parliament. In this way the consent of all three branches of the Legislature is required. The judges of the lower courts can be removed only by the Supreme Court, or upon a report by the two heads of the Supreme Court to the secretary for Scotland, as representing the Ministry. Practically, the appointments are for life, and no instance of the removal of any judge high or low has occurred for the last half-century. There is no specified age at which a judge is bound to retire, and although complaints are sometimes heard that judges continue to hold office, when it would be better that they should retire, there seems little prospect of any remedy being applied.

In Scotland all judges are appointed by the Sovereign upon the recommendation of the Secretary of State for Scotland. There is no such thing as the appointment of any judge by popular election or by any authority inferior to that of the crown. The appointments are almost invariably political,—that is to say, the Secretary for Scotland being a crown minister, recommends for

appointment persons from his own party. This works better than at first sight would appear. The Secretary of State is bound, according to popular opinion, always to appoint the best available man from his own side, and, though popular opinion is by no means shocked by a better man belonging to the opposite side being passed over, there would be a very considerable outcry were an inferior man on his own side promoted over a superior man who was willing to take the appointment. Jobs no doubt are said to occur in Scotland, as elsewhere, but, upon the whole patronage within each party is fairly administered, and each party having its turn of office pretty regularly, in alternate fashion, according to the swing of the political pendulum, a tolerably fair distribution of appointments is made. Occasionally indeed, the Secretary for Scotland may make an appointment from the other side of politics if there be no outstanding man upon his own side, and in such a case the courtesy is almost invariably returned when the other side comes into office. The evil connected with the political nature of the patronage is, that sometimes men who have entered the House of Commons or who have otherwise dabbled in politics are preferred to men whose claims as lawyers are considerably stronger.

All the Scottish judges, with the exception of certain judges in the lower courts whose duties are not much more than nominal, are obliged to give their whole time to the duties of their office. It is contrary to principle for a Scottish judge to continue to practice in any shape, and when a judge has once taken his place upon the bench, it scarcely ever happens that he returns to practice in the courts. He devotes himself for the rest of his life to his duties, and the reward to him for surrendering his practice, or his hopes of one is that when he fails to be able to perform his duties as judge, he is allowed to retire upon what must be considered a fairly liberal pension.

The salaries of all the salaried judges are fixed under statute, and are payable from the consolidated fund. Their salaries accordingly are not on the same footing as the salaries of the civil servants, and do not require to be voted annually by the House of Commons. In this way the House of Commons has no opportunity of punishing for unpopular decisions. The salaries are awarded on a handsome scale, in the Supreme Court, ranging from \$18,000 to \$25,000 a year. The salaries of the judges of the lower courts are much more moderate and vary within considerably greater limits, the territorial jurisdictions of the inferior judges being of very varying extent. In their case the salaries

vary from \$3,000 to \$10,000. an ordinary salary for the larger jurisdictions being about \$5,000.

As is well known the legal profession in Scotland is divided, as in England, into counsel or advocates, and agents or solicitors. Judges are almost invariably selected from the ranks of counsel. It is so long since any judge of the Supreme Court was selected from anything but that class, that it has almost been forgotten that there is power to choose them from the other branch of the profession. Occasionally a judge in the lower court is still selected from among the solicitors, but instances of this are becoming more and more rare, and it is only in very exceptional circumstances that such an appointment is made. The most common occasion of appointing a judge from the solicitor class,—if one can speak of a thing being common which happens very seldom—is in the Highlands, where it is sometimes difficult to find amongst the advocates, one who understands the language of the natives.

When judges are once appointed there is practically no promotion. Whatever position a judge, upon leaving the bar, has been pleased to accept, he retains, as a rule, for the rest of his life. No doubt there are occasional exceptions, but when one looks at these exceptions one cannot help seeing that they rather support the rule, for in very few of the cases where a judge has been promoted, has the fact of his having given unusually good service in the lower office, been the inducing cause of his promotion to the higher. The effect of all this, is that the Supreme Court judges and the lower court judges are chosen from different classes of counsel. In the sister country it has sometimes been said that the higher Bench is filled from the successes of the profession, and the lower Bench from its failures; and if the getting of practice in the courts be the sole criterion of success, this is true also of Scotland. Successful pleaders sail pleasantly through the sea of practice to their haven under the hill in the Supreme Court. The judgeships in the lower courts are filled mainly from two classes,—from juniors who have never been launched, and from seniors who have stranded. Possibly the popular view, that success is to be judged only from the standard of practice, may be wrong, and there may be other fields in law where good work may be done, nay, where if that be an object even distinction may be acquired.

The result of all these different arrangements common to all the salaried judges is that they form a very independent class. They are independent of all outside influences and what is more, they are independent of the Government of the day. Once

appointed, however keen partisans they may have been before, they as an almost unbroken rule refrain from politics. The charge of partiality for private individuals is as unknown as is the charge of subservience to the Government of the day. The possibility that men so independent might neglect their duties is taken away by care in selection for appointment of none except those whose habits of industry are formed, and it may be that it is influenced to some extent by the fact which always exists, that indolence might be punished by removal.

I come now to speak separately of the higher and lower courts, and I begin with the higher. The Supreme Judges form the Court of Session. That court, which is not one of the ancient institutions of Scotland, was founded so recently as 1537 by James V. of Scotland, and was modelled by him after the Parliament of Paris. Previously to that time the Supreme Courts in Scotland had, like other early courts of the kind, no fixed place of sitting and had sat from time to time in such places as the King directed. In the great advance of letters and of civilization which had taken place about the end of the fifteenth century, Scotsmen had come to notice that their country in having no settled court was behind other countries. The time was one of great intellectual activity in Scotland. James V. son of the unfortunate King who had fallen at Flodden, and born only a year before that battle, had a long minority, the greater part of which was spent in France where he had married the daughter of Francis I. He had distinct literary tastes and was popular among the people, being known as the "King of the Commons." He died young—only about thirty years of age—soon after the birth of Mary, whose singularly unhappy career became so famous. The King was the last of the male line of the Royal Stuarts of Scotland, and like those of his ancestors, his sympathies were for the continent and his own country. England was to him only the hated and baffled aggressor of centuries back. Not to it could a Scotsman then look for aught that would help in law or justice. The foundation of a great National Court was a worthy act with which to close the line of Stuart, though its founder could hardly have realized, even when modelling his court after the most famous court of the day and after filling it with men who had adorned the most famous schools of law, that his new institution was to work a revolution in the old Scottish laws, and virtually to re-make them in the light of the revived Roman jurisprudence.

The number of the judges was fixed at fifteen. Of these, seven were to be clerics, seven lay, and the president might

belong to either class. The "Auld Fifteen," as the first judges were called, formed one chamber. Practically they were a court of one instance. Each of the judges took it in turn to sit in the "Outer House" for the preparation of causes. This judge looked after the written pleadings, took the examinations of the witnesses in writing, and administered the numerous oaths of parties which according to old practice were requisite when he had completed the preparation of the case. He did not himself decide it, but reported it to the other judges who sat in the "Inner House." All proceedings including the arguments were thus at first in writing, having been formed upon the model of the Ecclesiastical Courts. There were then and for a long time after no juries—the judges deciding both fact and law. After the causes had been prepared by the Outer House judge, there soon came to be a "hearing" in the Inner House, and the causes were debated by advocates, a class of whom had existed for a very considerable time prior to the foundation of the Court of Session. The public had at first no right of admission, but each party could be accompanied by a certain number of "Prolocutors," and numerous were the complaints about the bringing under that name of large bodies of armed retainers wherewith to awe the court. After the hearing before the Fifteen, parties were "removed" and then began what was called the "disputation." The judges sat round a table and argued, sometimes it is said with uncommon vigor, the merits of the case. When they came to a decision it originally was embodied in writing and no reasons appear than to have been assigned. At a later stage parties were allowed to hear the "advising;" that is, after the judges had argued the case among themselves and had made up their minds they allowed the parties to come back again and hear them give their reasons. So little, however, was it regarded as a matter of right that the reasons should be communicated that the parties were not allowed to make notes of them till at a much later date.

When first founded, it was intended that the jurisdiction of the Court of Session should extend to every cause; but as the old Ecclesiastical Courts of the Bishops were not abolished it was some time before this could be fully carried out. For long there remained two sets of Ecclesiastical Courts—namely, the Superior and the Inferior Commissary Courts. These courts asserted a wide jurisdiction, but in practice were limited to jurisdiction in marriage, divorce, legitimacy and moveable succession. They were subject to appeal to the Court of Session, but remained as courts of first instance until modern times.

The Constitution of the Court of Session remained with little change till the beginning of the present century, when the court was remodelled and placed on its present footing. The judges were reduced from fifteen to the suggestive number of thirteen and the Court was divided into two instances. Five of the judges continued to sit singly in the Outer House as Courts of the first instance. Under the new Constitution they were expected not only to prepare the causes, but as had become customary, to give judgment upon them, and from their judgments there was appeal to the Inner House, now divided into two divisions of four judges each, each division having coördinate powers. About the same time publicity of procedure was introduced, and the practice of having written arguments to a great extent abolished. Trial by jury in civil causes was also introduced.

The Building in which the Court of Session met deserves a word or two of notice. In their earliest days the judges met in a small room round a green table. Afterwards they sat in the tolbooth, or as we would now say, town house. This however was not the famous tolbooth known under the name of the "Heart of Midlothian," but an older building. Afterwards the inner house was a building opening off the still existing "Parliament House," and the outer house judges sat in the Parliament House itself, which was also used as the *Salle des pas perdus*. This Parliament House was built sometime before the Union with England and was intended to be occupied by the Scotch Parliament, but was never actually used by it. It remained till recently little changed, I remember when I first frequented it that two of the old "boxes," as they were called, where the outer house judges sat, were still preserved in it,—open on all sides to the crowd who walked up and down. The front part of them has now been removed, and the back portions utilized as niches for statues.

The character of the old court of sessions was remarkable. During the time of its existence, Scotland was the scene of continuous feuds, lay or ecclesiastic, and the judges before and even during the eighteenth century, were by no means famous for impartiality. It was not the vulgar bribery by money which was in question. That although common enough in the southern end of the Island, has scarcely even been known in Scotland. Their character for impartiality was tarnished by zeal for their friends and occasionally by zeal for party or for church. The story is told of one of them who last century was reproached with the example of another whose impartiality was beyond question. The reply was: "It is no credit to him; he is a kithless loon." The

language of the judges, originally Latin, was afterwards broad Scotch, and they were accustomed to express their opinions with a plainness of language which in the present day would be appalling.

We get a glimpse of the way in which they conducted themselves, from one of the annual addresses of the president of the court to the bar, which has been preserved. In 1633 Sir Robert Spottiswood, the then president, lectured the bar in round set terms, garnished with innumerable Greek or Latin quotations. He began by admonishing them to conduct themselves virtuously and honestly, and then proceeded to scold them vigorously for the many faults he attributed to them. He accused them of "keeping up the pieces," that is to say obtaining possession of and retaining the pleadings. He said that those were the most culpable that were the most employed, and told them that there never passed a day but that they had to commune with some of them about it, "as if it were for the rendering of a town." Then, he indulged in some sarcasms at their expense and proceeded to rate them for their unpunctuality. He reminded them that although a bell was appointed to ring at nine o'clock in order that they might go timeously to the tolbooth, and that although they were "ordained by statute" to be there before the bell ceased from ringing, yet they were not ashamed to go in at half an hour before ten at the soonest. Then he told them that they did worse, —sometimes even absented themselves all day without necessary cause, and when they did come they occupied the time with "tediousness and idle repetitions." Of course if he had lived at the present day he could never have said such things. —Then he proceeded to say that they had a most uncivil fashion of interrupting each other, and from that, he went on to their great offense—that they wanted respect for their superiors.—Duty, he told them, consisted in a willingness, a sense of shame, and a ready obedience to their betters. To honor and respect the judge was, he told them, one of the very first principles of the profession, and "yet," he said "even in public ye cannot forbear to repine at that which we find," and he reminded them that, "the party that is prejudiced by our decree doth proclaim ready enough that his cause was good but he was borne down by the credit and friendship of his adversaries." Then he told the advocates that for this they were greatly to blame. "We owe," he said, "this most to you. I will not stick to tell it, for the people is possessed with this opinion, and say that there is little regard had before us to the justice and equity of cases." He

finally admonished them: "suspect your own judgements rather than ours," and "quiet your passions and opinions, and acquiesce with that which shall be found."

Gradually, however, the reputation for partiality died out and nothing was left that was remarkable except a reputation for eccentricity and for conviviality. Their eccentricity found vent in many a joke both on and off the bench, and their conviviality was notorious. They dined early in the day and sometimes it is said continued their potations all night. The story is told of one of them that, a friend, calling in the forenoon, was told by the servant that his master was at dinner. The visitor replied that he thought his lordship did not dine till one o'clock. "True," said the servant, "but this is yesterday's dinner not quite done yet." Their potations, however, although lengthy, were not strong, French wine and Scots ale being the staple. They continued, for they were a conservative race, to drink claret long after Lord Methven's taxation had driven other people to Port. This continued into the present century, and claret being then expensive, the juniors were expected to refrain from it when it was passed round at the judges' dinners. The deference paid to age prevented the custom having the inhospitable look it would now have, but the juniors came not to admire it. The story is told of young Brougham that he ignored this and helped himself to the claret. When he did this a second time, a judge said: "Maister Brougham, that's claret." Brougham's reply, "Yes my lord, and very good claret too," ended the custom.

Their wit sometimes was cruel. The story is told of one of them, Lord Braxfield, that he had to sentence to death for sedition a man with whom he used to play chess. In sentencing him his remark was "That's mate to you." Sometimes they had a lighter wit and I remember one of the last of them who spoke in Scotch giving a caustic specimen of it. A young counsel who had to defend the relevancy of a pleading which had been drawn by his senior replied (somewhat impertinently) to the judge when asked what he could say in defense of it, "Oh my lord, I did not draw it." "Yes," said the judge, "but you don't mean that that of itsel' shows it to be right." Nowadays things have changed and one need no more expect to hear Doric wit in the Court of Session than to hear the English judges joking in the Yorkshire dialect. Little remains of the old picturesque fashions save the robes of the sixteenth century, still resplendent with scarlet and crimson and white, as they came from the French judges, with whom they had survived from old clerical fashions. The most odd feature of the costume is the little bob wig of the early eighteenth century

which surmounts it all. At the time when everybody wore these wigs the judges followed the prevailing fashion, and, as judges never abandon any habits, these wigs still surmount in the most incongruous fashion the venerable robes. Other curious customs still remain. There is the custom of taking a judge on trial after he has received his letter of appointment from the Crown. The judges gravely assemble to hear the letter read and stand to hear it, for is it not Her Gracious Majesty's message? Then they consent to take the Crown nominee on trial, for even a Sovereign may err when it comes to a question of knowing somebody who knows Scots Law. They send the nominee off to the Outer House with a judge to hear a case. The nominee returns after hearing it with the judge who has taken him in tow. This judge gives his report of the case, and then the nominee is called upon to say how he would decide it. The judges hear his opinion with the gravest courtesy. I have seen them proceed deliberately to disagree with it, but to say that although they did not think his opinion right, still it showed a very sufficient knowledge and entitled him to a seat on the Bench. They then pass him, each learned brother shakes him by the hand, and the President, addressing him by the title he is to adopt, bids him take his seat on the bench. The title, too, is a quaint relic of the past. Each Supreme Court judge gets the title of "Lord" not possibly as matter of strict legal right but as matter of old invariable custom, both on and off the bench. The older lords were also "Lairds," and the title was always prefixed to the name of the estate. Thus Mr. Home of Kames became on taking his seat on the bench Lord Kames. This custom is still kept up, though it is now more usual to use the title in connection with the surname. The old custom had its disadvantages, for the wife got no corresponding title, and when Lord Kames, for example, traveled about with Mrs. Home, hotel keepers abroad were sometimes puzzled. It is said of James V. that the inconvenience was pointed out to him, but that he turned it off with the remark that he had made "the carles lords, but was not to make the carlines ladies."

While the Court of Session has now the entire charge of all civil questions in Scotland, criminal jurisdiction is vested in the Justiciary Court. This was once a quite separate Court and its Constitution is older than that of the Civil Court. It is now formed of the same judges as the Court of Sessions, the only difference being that when they sit as Lords of Justiciary, they wear another set of robes and have a separate staff of registrars. The Lord President of the Court of Session when he sits in the Justiciary Court, takes the title of Lord Justice General. Usually the Court is presided

over by the President of the second division who sits as Lord Justice Clerk, a title doubtless derived from the *justiciarii clerici* of very remote times. The Justiciary Court being the supreme Criminal Court has cognizance of all the more serious crimes and has primitive jurisdiction in capital offenses.

From the Court of Session there is appeal to the House of Lords at Westminster. This came in place of the appeal from the Court of Session to the states of Parliament, which existed prior to the Union of 1707. There being no mention of it in the act of Union, it was for some time a question of doubt whether it existed, but the House of Lords began early to exercise the right and finally it came to be fully recognized. In theory the House of Lords is a very anomalous tribunal, but in practice, only the Law Lords sit upon appeal cases. The appeal is a very expensive one and is used only in important causes. There is no appeal from the Justiciary Court.

The sheriffs are the Judges of the lower courts, one or more of which is established in every county. These courts are a survival from the earliest times. The Saxon County Court consisted of the sheriff, the earl and the bishop. When earl and bishop ceased to sit we have no record. We can trace the sheriff in Scotland as the sole judge of the County Court as far back as our annals can go. The Saxon "Scirgerefa" corrupted by the learned class into "sheriff," by the unlearned into "shirra," has continued without break during all the historic period to exercise his judicial functions. While in England he has degenerated into a mere executive officer, and while the same fate seems to have overtaken him in America, he remains in Scotland clothed with most of his original functions. How he was appointed in the Saxon times in Scotland, we do not exactly know. Probably in the part of Northumbria which lay within the present confines of Scotland, he was appointed in the same way as in the rest of the Anglo Saxon world. As the Saxon (or rather, Anglian) part of Scotland dominated the Celtic in all matters, all the Scottish Counties came after the consolidation of the kingdom to have sheriffs. Possibly some Celtic tribal official, perhaps the Mormaor was converted into him. When the Norman influence came in, he was appointed by the King and came to be known as the King's sheriff. Finally under the Stuarts the office became hereditary and it continued so until the end of the last civil war in 1747. Originally the sheriff had apparently had jurisdiction over the whole county, but in the Norman times, many of the barons had grants as lords of "Regality," which gave them within their territories a concurrent jurisdiction.

As the shires were the remains of independent principalities, it was a matter of course that in early times their judges had plenary jurisdiction. Remains of that state of matters still exist. The jurisdiction of the Scotch sheriff courts resembles in many respects that of a Supreme Court. Their judges have all the powers in their courts which Supreme Court judges have, and like them they are while in court addressed as lordships. As holding the Royal Judicial Commission, they are entitled if they please, to wear silk like the English county court judges, but they are content with the stuff gown of the advocate, surmounted as usual by the bob wig. Their title out of court is "sheriff"—a title used only in Scotland. In many matters their jurisdiction is still, like that of a Supreme Court, unlimited. In the Norman times their jurisdiction suffered limitation from the feudal idea that titles to lands were too important matters to be judged of by inferior courts; but the very proceedings by which they were deprived of jurisdiction in that matter, showed that they originally possessed it. In questions connected with land, they are now limited to deciding points that arise on contracts and on points of possession. Another limitation of their jurisdiction came from the rise of the Ecclesiastical Courts, the higher commissary courts taking their jurisdiction in matrimonial and legitimacy questions, and the lower commissary courts their jurisdiction in cases of moveable succession. In almost all other matters their jurisdiction is concurrent with that of the supreme court and is practically unlimited, so that at the present day they decide in all questions of debt, and moveable right and bankruptcy, to any amount. The distinction between law and equity being unknown in Scotland, they are courts of both. They are favorite courts with the common people and a good deal of the jurisdiction of which they were deprived has recently been restored to them. The lower commissary courts were merged in them, and recently to a limited extent they have obtained jurisdiction in questions of title to land. Their procedure was till lately modelled on that of the Ecclesiastical courts and entirely in writing. Trial by jury except in criminal cases was never known, and to this day is incompetent. Where a case is to be tried by jury, it must, if it have been begun in the sheriff court, be removed to the Court of Session. The form of procedure has remained substantially the same, the only difference being that oral argument has been substituted for writing, and that the evidence in place of being written out by the judge is now written by shorthand writers. From the sheriff court in all actions above £25 in value, there is an appeal to Inner House of the Court of Session.

The criminal jurisdiction of the sheriff courts was once extensive, the judges of it having had till last century the power of life and death. Under the old law they possessed the power of deciding on everything except the four pleas of the crown, namely, deliberate murder, rape, robbery and fire raising. They now possess jurisdiction in the last two, and they have jurisdiction in every other crime. Their power of punishment however is now limited. Capital punishment they can no longer inflict. They once had the power of banishment, but only from the county and they never had the power to banish from Scotland. Accordingly the power of inflicting penal servitude, which was substituted for banishment from the country, was never possessed by the sheriff courts. Their highest power now is that of imprisonment, and as it is not customary to imprison for more than two years, the jurisdiction of the sheriff is now limited to cases where the public prosecutor thinks that that punishment will be enough. The sheriff has also the power of imposing arbitrary fines. In all cases where more than sixty days' imprisonment is to be awarded, he has as a rule to summon a jury. Where that amount of punishment is sufficient, he can try the case summarily.

The staff of the Sheriff Court Judges is in an anomalous position. The old Saxon office of Sheriff has in course of time come to be split up into three offices—that of the high sheriff, that of the sheriff depute, and that of the sheriff substitute. During the time of the office being hereditary, the sheriff, usually a powerful landowner, was too great a man and too indifferent a lawyer to be troubled with legal work. He reserved for himself the stately functions of presiding over the freeholders, keeping the peace, and representing the shire on great state occasions, leaving the court work to a deputy. When the hereditary jurisdictions were abolished, this division of the office was stereotyped. The office of high sheriff was appointed to be conferred annually or during the sovereign's pleasure, and he was debarred from interfering with law. The duty of presiding in the law courts was given exclusively to the sheriff depute, and precautions were taken that he should be an educated lawyer and should reside for a certain time each year in the sheriffdom. Soon the sheriff deputies grew lazy and began to delegate their duties to substitutes. At first these last officials were honorary; then the sheriff deputies gave them a share of their own salaries; then they were recognized and paid by the public. Finally they got the position of permanent judges and the Crown assumed the duty of appointing them.

The judicial work is now, therefore, divided between the sheriff's depute and substitute. The sheriff depute has come to be the true anomaly of the Sheriff Court, but he survives in spite of the efforts of the law reformers of all shades of politics. Although a judge, he is allowed (in all but two instances) to practice. He does not reside within his jurisdictions and he may even mix himself with politics. He has the power (which he never exercises) of trying any cause in the court, and he sits as a judge of appeal, of an optional kind in most but not all cases—parties having power to go to him, or to the Court of Session, or in succession to both as they please. The sheriff substitute is the true judge ordinary, or trial judge, of the country. His rise has been rapid, and he is plainly enough destined to remain, when appellate jurisdiction is simplified by the excision of the intermediate stage of appeal now allowed between him and the Court of Session. In legal circles the word sheriff when used usually designates the sheriff depute; in the community, it usually designates the sheriff substitute.

The unpaid judges in Scotland require very few words. They consist of the magistrates in the old "Royal Burghs," and in certain other more modern burghs formed upon their model, and of the Justices of the Peace in the counties. The magistrates of old had a very large jurisdiction both civil and criminal—a jurisdiction equal to that of the sheriffs, and in the first half of the present century that jurisdiction was in many burghs still exercised. They now try nothing but summary criminal and police offenses,—the maximum punishment being imprisonment for sixty days. The magistrates are chosen by the Town Councillors, and these are elected by all the occupants of houses within the burghs. They are the only survivals of popular election to offices in any way resembling judgeships which remain in Scotland.

The Justices of the Peace were the invention of James I. (of England) who introduced them into Scotland after an English model. They never acquired a hold in this country, and their theoretical powers are limited to those which the burgh magistrates now exercise, but as a matter of practice the sheriffs having as a rule concurrent jurisdiction, the cases which they try are very unimportant and few in number. The Justices of the Peace are nominated by the Lord Chancellor on the recommendation of the Lord Lieutenant for the county and the considerations which lead to their appointment are largely political.

J. Dove Wilson.

THE IRRIGATION QUESTION IN CALIFORNIA.

The economic future of the far west is largely dependent on a practical solution of the problem of irrigation. Millions of acres lie there sterile and lifeless, yet with all the elements of fertility locked up in the soil, and with a sunshine and a climate favorable to every kind of agricultural production. The nimble jugglery of the statistician does not enable one to grasp the situation. Square acres of maps and huge columns of figures convey but a dim impression of the urgency of the problem. Only the traveler who has passed over the vast solitudes and witnessed the transformation wrought here and there by some unknown Aaron of the wilderness, can appreciate the enormous forces of nature waiting for a deliverer. From the earliest settlement of the arid states of the West it was apparent that the question of water rights could not be left to the old rules of the common law. They were not adequate to the exigency. Their customs were crystallized into rigid rules in a land and a time when the permanent diversion of the water of a stream to irrigate the land of riparian owners for the purposes of cultivation was not required. In the far west on the contrary, the land is to a large extent valueless without the annexed right to appropriate water for the growth of crops. But the water is limited in amount while the irrigable area is almost illimitable, and the unguarded right of appropriation in one deprived another of the use of his property. The question forced itself at once into the domain of public regulation. Various complex codes sprang into existence having for their object the reconciliation of conflicting private interests and the greatest possible utility to the irrigable territories of all possible sources of water. So far as these laws provided for the regulation of private rights alone they were not sufficient; laws allowing the absolute ownership of water by an individual very often sacrificed the subsequent public welfare and the just rights of future settlers for the sake of a definite adjudication of title. Laws which allowed the proprietorship of water only to the actual occupant and cultivator of land, prevented the formation of companies to disperse the water over large areas. In States where

the old substratum of the common law underlay the subsequent statutory enactment, satisfactory decision of some complex problems could not be obtained. In California no one has ever been able to determine how much water a subsequent proprietor settling on the stream above a prior settler, could use for irrigation without entrenching on the rights of the lower owner. The Supreme Court, in a decision¹ some two hundred pages long, finally held that he could use as much as was necessary to cultivate the land *provided* he did not so divert the water as to materially injure his neighbor. The rule raised a very mixed question of law and fact as to what diversion was a "material" injury, and only added to the confusion already existent.

The dominant fact in the comprehension or settlement of the irrigation question is the incapacity of the individual to deal successfully with the problem and the consequent failure of laws acting on the individual alone to solve it. The settlers of the West were generally poor and their successors have limited capital. On the other hand the irrigation of arid lands of any locality very often require the construction on a great scale of works for the imprisonment and dispersion of the water. Dams have often to be driven down scores of feet through drift gravel to collect the percolating waters of sunken rivers, or tunnels to be driven through a great wall of rock to intercept the mountain flood. Subsidiary reservoirs are often required to subdivide the waters, canals lined with concrete and many miles long to be dug—power houses to force the reluctant tide to the point of ultimate dispersion. The work and capital required to supply one land owner with water often suffice to supply a hundred with the same facilities. The cost of such enterprises, even where of modest dimensions, is practically prohibitive to the individual irrigator, although the relative cost to each of the farmers of the community might be small. The power of organized capital is required and the coöperated support of the community. Such capital must be sought most often beyond the locality and frequently beyond the State. Private corporations to monopolize and hire out the water have been accordingly largely the means by which the arid tracts of the West have been made capable of cultivation. In favorable localities they have operated with some success. But there are many grave objections to leaving the question to private capital. Where it divorces the ownership of the water from the land, friction arises between the company and

¹ *Lux v. Haggin*, 69 Cal.

the irrigators. The cultivator suspects that he is robbed, as very likely he may be—and resents the "tyranny" of dues. Granger legislation is passed fixing rates¹ and harrassing or throttling capital. Such companies are also often involved in a mesh of litigation which heavily increases its charges. The sources of water are so valuable and conflicting titles are so easily born of the vague claims of early occupants, that vexatious litigation, and ruin very often attends the attempted appropriation or purchase of a water right. The same difficulties increased by internal dissensions very often attend the formation of stock companies by the cultivators. One result is that capital to develop water rights is not easily obtained in many sections of the great West, or it can be gotten only on exorbitant terms.

To secure the immense amount of capital required a ground work of unquestionable security for the investment must be obtained; to obtain a clear title to water rights the barnacles of conflicting claims must be cleared away and to secure the just and equitable distribution of the water for the greatest good of the greatest number, resort must be had to some degree of public regulation and control. A public corporation providing security for capital by the power of taxation, clearing titles by the exercise of the right of eminent domain can alone completely answer all the requirements of the problem. The legislature of California accordingly passed the Wright act in 1887. The basal principle of this act was the division of the arid areas of the State into communities or districts whose limits were determined by their irrigability from the same common source of water supply and the same system of works. The admirable object of this act was to group productive communities around centers of water supply which would irrigate all the land within the district. The districts were, however, not attempted to be arbitrarily formed in the act, but were to be formed on the invitation of the people of the locality in accordance with the general provisions of the law instituted by a petition signed by the required number of freeholders and acted on by the Board of County Supervisors.²

So the great public powers of taxation and eminent domain are united with home rule as to the extent of debt incurred and the details of management. It is the general testimony of all

¹ This is done in Wyoming.

² For a sketch of the essential provisions of the act the reader is referred to *Bradley v. Fallbrook*, Irr. Dis. 68, Fed. Rep. 948; the *Yale Law Journal* for December, 1895, may also be consulted.

who are familiar with the situation in California that the act has been eminently successful in attaining the reclamation of a very large area of arid land which private capital would in all likelihood never have developed. Many millions of dollars have been invested in the municipal bonds of the various districts and the prosperity of many sections of the State has largely increased through its operation. The exercise of the power of taxation by the district government and the consequent sales of land within the district for delinquent assessments against the consent of the owners led to bitter assaults on the validity of the act. The arbitrary incorporation of whole cities and towns within the districts by the Boards of Supervisors has lent fuel to the fire. The high valuation of the improved property of these municipalities largely lighten the burden to the farmer tax payer within the same district. Each land owner is entitled to receive a share of the water for irrigation purposes in proportion to his assessment, and, theoretically, he receives his benefits in the sale of his share in case he does not wish to use it. But the acquisition of a large supply of water for "irrigation" purposes by the owner of a dry goods "emporium" in the middle of a city is a somewhat inadequate return for his tax.⁴

As a consequence the validity of the act under which these district corporations were organized and the constitutionality of their exercise of the power of taxation was brought before the Supreme Court of California in five different cases.⁵ A large number of technical objections were raised in all these cases attacking the acts of the district officials on the ground that the requirements of the act itself were not complied with; but so far as these objections do not assail the constitutionality of the act under which they were formed they are passed over.⁶

The Supreme Court of California uniformly overruled these objections and upheld the validity of the law as constitutional on reasons largely of public policy. The law was regarded as firmly established in view of the affirmation by the Supreme Court of

⁴ Real property is required to be listed by statute at its full cash value, including improvements.

⁵ *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360; *Central Irrigation District v. De Koppe*, 79 Cal. 351; *Crall v. Poso Irrigation Dist.*, 87 Cal. 140; *Board of Directors v. Tregoe*, 88 Cal. 334; *In Re Madera Irrigation District*, 92 Cal. 307.

⁶ Numerous questions were raised impeaching the constitutionality of the act under the peculiar provisions of the Constitution of California affecting municipal corporations. None of these objections have solidity. For a discussion of them, see *In Re Madera*, etc., 92 Cal. 307.

the United States of the constitutionality of the reclamation districts which were public district corporations formed to drain swamp and overflowed lands.⁷

The opinion of Judge Ross in July last,⁸ rendered in the Circuit Court for the Southern District of California, practically upholding the vital objections raised before the Supreme Court of California in the cases cited fell like a thunder bolt from the clear heaven, staggering investors and invalidating all the bonds issued under the act.⁹ The reasons advanced by Judge Ross for holding the exercise of the power of taxation by the district authorities invalid divides into two great branches. It is asserted in the first place that the private property of the citizen cannot be taken for the benefit of a limited class in the taxing district to the exclusion of the remainder of the community: That the use to which the funds exacted by the power of taxation is devoted must be open to all the members of the taxing district on equal terms and conditions and that the exercise of taxation in the specific case at bar is for the benefit of the land owner of the district alone, and that this use is accordingly a private one and not for the benefit of the public at large, and that any incidental benefit which the State may derive no matter how important or extensive does not and cannot make a private use a public one.¹⁰

⁷ *Hagar v. Reclamation Dist.*, 111 U. S. 701, wherein it is said by Mr. Justice Field: "It is not open to doubt that it is in the power of the State to require local improvements to be made, which are essential to the health *and prosperity* of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts and of levees to prevent inundations, *as well as for the opening of streets and of roads in the country.*" (Not italicized in original).

⁸ *Bradley v. Fallbrook Irri. Dist.*, 68 Fed. Rep. 948.

⁹ The Bondholders would not of course be entirely without remedy in case the districts should refuse to pay the bonds, or were unable to do so because taxpayers availed themselves of the principles laid down in the decision. They might, of course, follow the proceeds of the bonds, in equity, and seize on the works constructed with them. This would involve a change of security.

¹⁰ The case in point was a suit in equity to enjoin the execution of a deed of certain land of the complainant given by the collector of the defendant irrigation district under a sale to satisfy a delinquent assessment against his property, and the argument proceeds on the ground that such an enforcement of the assessment by the district officials with certain provisions of the constitution of the U. S., which declares that no person shall be deprived of his property without due process of law, and that the act provided for the taking of private property for private use, the decision proceeds: "It is the purpose and use of a work which determines its character. Streets and highways are in their routine public; for the very purpose of their construction is the

This contention strikes at the very root of the question—what are the constituent elements of a public corporation? and what is the public use for which the power of taxation may be exercised? Can any ultimate increase in the general prosperity of all the citizens of a community justify the imposition of an assessment for the proximate benefit of a class even where the incidence of the assessment is limited to the class immediately benefited? In other words, can no great public improvement be wrought because the *immediate effect* of it be to benefit a specific class? It is apparent from a close examination of the cases in which the power of taxation by local boards has been upheld that a square negative to this question cannot be maintained. The power of taxation or of enforced assessments is habitually exercised for the benefit of a class which may be more or less numerous but clearly distinguishable from the great class of the people of a municipality. A schoolhouse located in a defined subdivision of a city for the benefit of the residents of that subdivision benefits only those who have

accommodation of the public to the use of which every person is entitled upon the same terms and conditions as every other person. Water appropriated or designed for the use of cities and towns becomes charged with a public use; for the very purpose of such appropriation is the supplying of the public with their necessary element, and every person within such cities and towns is entitled, or is on precisely the same terms and conditions. So, also, in dry and arid regions like many and great sections of California where water is their very life blood, is water appropriated or designed for the use of the public for purposes of irrigation. But can this properly be said in respect of a district however extensive its boundaries, when only certain persons are entitled to enjoy its use—that is to say, where only the land owners in the district are entitled to the use? Such land owners may be many in number or they may be few. It is manifest, however, that the character of the use is not to be vested by the mere number of persons who may enjoy it. No man's property can be constitutionally taken from him without his consent and transferred to certain other men for their use, however numerous they may be, and that is just what the legislation in question authorizes to be done. Private property is thereby authorized to be assessed and sold to provide water to supply the land owners in a certain district more or less limited in extent for irrigation purposes. Every person within such district is not entitled to the use of the water so provided upon the same terms and conditions as every other person, but only those persons who happen to own land in the district; of course the property of those individuals would thereby be improved, and indirectly the public good be thereby advanced. But every improvement advances the public good, every enterprise, no matter how strictly private it may be, if it be lawful and adds to the health, comfort and happiness of the people, is for the public good. The building of a house, or the planting of a useful or beautiful tree is for the public good. But surely private property cannot be taken against the owner's consent on the ground that the public interest would be thus promoted."

children to send, but property owners are not relieved from taxation because they have no children. The benefit to the public at large requires the sacrifice of the individual who receives only the indirect benefit of the general welfare. Enforced assessments upon the land owners of a district formed to drain swamp or overflowed lands have been supported as an exercise of a public power of taxation not alone on sanitary grounds but on the broader grounds of the public welfare.¹¹ Assessment districts for the construction of levees to prevent inundation may be referred to the police power to protect life and property, but they are justified in the decisions on the ground of a general public improvement. It is even impliedly admitted in the decision itself that the territory to be irrigated may be so extensive as to justify the construction of works at public expense for the benefit of coming settlers, provided each may use the water on the same conditions as any other.¹² But can it be said that it is legitimate to tax the people of the whole State for the benefit of a section, but that it is not legitimate to accomplish the same purpose by dividing the same section up into districts and compelling the cost of the irrigation to be borne by the people whom it directly benefits instead of by the people of the State at large? It seems apparent that if the entire people of a State

¹¹ *Hagar v. Board, etc.*, 47 Cal. U. S. 222 it was said: "But we need not rest our decision on the narrow ground that this is strictly a local improvement. On the contrary the reclamation of the vast bodies of swamp and overflowed land in this State may justly be regarded as a public improvement of great magnitude and of utmost importance to the community. If left wholly to individual enterprise it would probably never be accomplished." And in *Irrigation District v. Cultivators*, 76 Cal. 368, it was said: "The results to be derived from a drainage law and one which has for its purpose the irrigation of immense bodies of arid lands must necessarily be the same as respects the public good; the one is intended to bring into cultivation and make productive a large acreage of land which would otherwise remain uncultivated and unproductive of any advantage to the State, being useless, incapable of yielding any revenue of importance toward the support of the general purposes of State Government by reason of too much water flowing over, or standing upon, or percolating through them. The other has for its main object the utilizing and improvement of vast tracts of arid and unfruitful soil, desert-like in character, much of it, which if water in sufficient quantity can be conducted upon and applied to it, may be made to produce the same results as flow from the drainage of large bodies of swamp and overflowed lands."

¹² "The scope of the legislation under consideration is not limited to cases where the territory designed to be supplied with water for irrigation is so extensive as to assume the importance of a public undertaking and where thus provided, the water is available to every person within the district upon the same terms and conditions." (At page 960).

may be taxed for a local improvement which can only immediately benefit the class who reside there, the same affect may be attained by taxing the beneficiaries only; at most only a land owner can obtain the direct benefit of irrigation works, and the construction of any system whatever by the people of the State would be for the immediate benefit only of those who purchased the land. Either the State can undertake no system of irrigation at all, or taxation for the proximate benefit of the irrigator must be found to be constitutional, on the ground that the prosperity of the State is absolutely dependent upon it." From time immemorial the power of public taxation has been exercised not only to develop the land of a State but to enable the owners of it to enjoy their property. The running of surveys, the building of roads, draining canals, etc., have been undertaken not primarily that all the members of the community may enjoy these objects of

¹⁸ *Coster v. Tidewater Co.* 18 N. J., Eq. p. 54; same case, p. 531, throws an interesting light on the difference of opinion between even strict constructionists as to when the incidental public benefits from a local improvement may be so general as to justify the formation of a public corporation for its attainment. The case arose in equity on injunction proceedings against a corporation formed to clear a large area of swamp land in New Jersey of the water. None of the members of the corporation owned the land to be cleared, but the corporation was vested with right of eminent domain, and to charge the cost of the proceedings by assessment upon the owners. In chancery, Zabriskie chancellor (18 N. J. Eq. 54) held that the powers employed by the corporation of assessment, etc., could not be sustained, on the ground that the corporation was not formed to attain an object in which the public had a use, because the public "cannot use the meadows or the dykes, ditches, drains, culverts, pumps or machinery; any stranger walking upon them" (the meadows evidently), "pasturing his horse, or cutting grass there would be a trespasser. No right is granted to any of the public." So far as the act was sustained at all it was on the ground of a public regulation of private property as a sort of *quasi* party wall (see *infra* discussion of Judge Ross' second objection). On appeal to the Court of Errors, however Beasley, C. J., also a strict constructionist, said, upholding the use as a public one (18 N. J., Eq. 531), "That the legislative authority is competent to effect the end provided for in this act I can entertain no doubt. The purpose contemplated is to retain and bring into use a tract of land covering about one-fourth of the county of Hudson and several thousand acres in the county of Union. This large district is now comparatively useless. In its present condition it impairs very materially the benefits which naturally belong to the adjacency of the territory of the State to the navigable waters. It is difficult from the great expense of such works to build roads across it and consequently it has heretofore interposed a barrier to anything like easy access except by means of railroads from one town to another situated upon its borders. To remove these evils and to make this vast region fit for habitation and use seems to me plainly within the legitimate province of legislation and to affect such ends I see no reason to doubt that both the prerogatives of taxation and of eminent domain may be resorted to."

public expenditure, but that the contiguous land may be made productive, that the raw material of all wealth may be produced, and that as an indirect result population may be attracted and the objects of taxation may increase.

A very large area of the Western States is arid land. Any public measure for their irrigation will benefit only the land owners. "Any terms and conditions" on which "all" may enjoy the "right to use the water for the purpose of irrigation" can in any event be immediately enjoyed only by the land owners.

That a broad distinction exists between taxation for the development of land and for the protection of manufacturers is obvious. Without the land none can live. It lies at the base of all industry and material happiness. Every increase in the fertility of large areas powerfully affects every class of industry, while the extinction of the fertility of the land wipes out civilization itself. The imposition of a protective tariff enables a class—the manufacturer—to charge more for the article he produces than he otherwise could. But the exercise of taxation to irrigate land is primarily to make the State itself inhabitable; not primarily to benefit the land owner considered as a class but to prepare the land itself, the common source of all wealth, to support successive generations and form the foundation stone of a splendid civilization.

Can it be claimed that the national government would have no authority to appropriate money to reclaim a barren desert in its midst whose domain might be sufficient for the construction of many States? and that it could not tax all the people to so provide homes for the overflowing population? In every nation where systems of irrigation have been required, the subject has overleaped the limits of private right into the great domain of public regulation and control requiring a unitary system and constantly tending toward the exercise of eminent domain and public taxation.¹⁴

¹⁴ As to the general power of the State to authorize such taxation, it was said in: *In Re Madera*, etc., 92 Cal., "If in the exercise of its care for the public welfare it finds that a specific district of the State needs legislation that is inapplicable to other parts of the State, it may in the absence of constitutional restrictions, legislate directly for that district; or if it be the case that similar legislation be required for other portions of the State it may provide for adopting such legislation or such portions at the will of the people in such districts as was done in the reclamation and levee laws already referred to. It may, too, by general laws authorize the inhabitants of any district under such restrictions and with such preliminary steps as it may deem proper to organize themselves into a public corporation for the purpose of exercising those

The danger of this point of view is the confusion of a public use with a public "benefit." If the two are not kept sharply distinct there will be no bounds to the exercise of the powers of

governmental duties upon the same principle as it authorized the incorporation of any municipal corporation under general laws," and in *Board of Directors v. Tregoe*, 88 Cal. 334, it has said "whether the tax be by direct imposition for revenue or by assessment for a local improvement, it is based upon the theory that it is in return for the benefit received by the person who pays the tax or by the property which is assessed. For the purpose of apportioning this benefit the legislature may determine in advance what property will be benefited by designating the district within which it is to be collected, as well as the property upon which it is to be imposed; or it may appoint a commission or delegate to a subordinate agency the power to ascertain the extent of this benefit. It may itself declare that the entire State is benefited and authorize the burden to be borne by a public tax; or it may declare that all or a portion of the property within a limited region is benefited, either according to its value, or in proportion to its actual benefit to be specifically ascertained by the actual determination of officers appointed therefor. It is not necessary to show that the property within the district may be actually benefited by the local improvements, and even if it positively appears that no benefit is received, such property is not thereby exempted from bearing its portion of the assessment, nor is the act unconstitutional because it provides that such property shall be assessed. Property that is exempt from taxation has always been held subject to the burdens of assessment for local improvements and property within a district that is not susceptible of receiving any immediate benefit from the improvement is nevertheless so indirectly benefited thereby, that it must bear a portion of the burden. If within the limits of a levee district a parcel of land should be so situated as not to require the protection of the levee, that would be no reason for excluding it from its share of the expense, or if within the limits of the drainage district there should chance to be found a cliff that would be no reason for exempting it from assessment." In *Hagar v. Board*, etc., 47 Cal. 222, it was said: "The authority to compel local improvements at the expense of those to be immediately benefited is not taxation, though referable to the taxing power. It has never been held that taxation for general purposes or for local improvements is an infringement of that clause of the constitution relating to the acquisition and enjoyment of property tax, nor does the enforcement of a valid tax by whatever method constitute a taking of property without due process of law in the sense of the constitution, nor is it a taking of private property for public use within the purview of that instrument." And in *Hagar v. Reclamation Dist.*, 111 U. S. 705, by Justice Field it was said: "The expense of such works may be charged against parties specially benefited and be made a lien upon their property. All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode according to the benefits received. Absolute equality in imposing them may not be reached, only an approximation to it may be attainable. If no direct and insidious discriminations in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that to some extent inequalities may arise * * * wherever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation or by laying the burden upon the district specially benefited by the expenditure."

taxation except such as may lie in the discretion of the legislature. The early notion of a public "use" under the common law was the right of each member of a community to enjoy a material thing as water, or a public park, purchased with the public funds. The growing necessities of a complex society and large population led to an extension of this notion of a public use to such objects as might be enjoyed by each member of a taxing district; and where large areas of the land of a state are to be reclaimed by drainage or irrigation the law makes a further extension and on grounds of necessity finds by construction the conception of public use satisfied by the possible ownership which each member of the community and successive generations may have therein. The land is fixed while the generations change. But this exception must be confined to the land and is justified only by its peculiar relation to the state.¹⁵

The second vital objection raised by the decision is that if the enforced assessment be referred to the peculiar power of the Legislature to establish regulations for the improvement of a common tract of land, owned in severalty and susceptible only of a joint improvement, at joint expense¹⁶—no sufficient opportunity was afforded the land owner to contest the validity of the proceedings upon which the assessment was based. This legislative power is called, in the decision, "The powers of assessment for local improvement."

The terminology is misleading and the power defined by the Supreme Court must be clearly distinguished from the power of assessment enforced by a municipality upon the adjacent land

¹⁵ Nobody can obtain the use of the water on a city street except the real estate owner. Any member of the community may purchase a house on the street and obtain the benefit of the water on payment of the tax. So any individual may purchase land in an irrigation district and obtain the water on payment of the tax. Another more striking instance is the creation of supreme courts of appeal by the legislature at public expense under a constitution allowing a legislature to create a "supreme court and such inferior courts as they may see fit." Under such provisions the legislature may largely confine the right of appeal to the highest court to persons only whose controversies involve titles to real estate. The upshot of which is that other litigants are supplying taxes to create a supreme court for the immediate use of citizens having law suits involving such titles.

¹⁶ In *Wurts v. Hoagland*, 114 S. 613 it was called: "The power of the legislature to establish regulations by which adjoining lands held by various owners in severalty, and in the improvement of which all have a common interest, but which by reason of the peculiar natural condition of the whole tract cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful at their joint common expense."

owners for the construction of roads, sewers, etc. For this power springs from the power of taxation.¹⁷ It is according to the cases one aspect of this supreme legislative power over the property of the citizen. But how can a forced assessment be exercised by members of a class for their private use? If referable to the power of taxation it can be exercised only for a public use which determines the limit of the taxing power. Nor is it the power of eminent domain, for that power is based upon full compensation to the citizen for the property taken, and where the assessment exceeds the benefit received it involves to that extent a condemnation of the surplus without compensation. It is, therefore, neither an exercise of the power of taxation, assessment for local improvement as usually understood, nor of eminent domain. It is an anomalous principle in the law of property rights. It has its origin in ancient usage and is analogous to the principle which requires the joint tenants of a party wall to share the expense of its repair. The principle was first clearly enunciated by the Supreme Court of the United States in construing a Mill Act, which allowed a land owner to erect and use a mill on a non-navigable river upon paying the adjacent owner damages for the overflow and it was said by the court in upholding the constitutionality of the act.¹⁸

"The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act of which any owner of land upon a stream not navigable may avail himself at will can be upheld as a taking by delegation of the right of eminent domain of private property for public use in the constitutional sense is so important and far reaching that it does not become this Court to express an opinion upon it, when not required for the determination of the rights of the parties before it. We prefer to rest the decision of this case upon the ground that such a statute considered as regulating the manner in which the rights

¹⁷ *State v. Fuller*, 34 N. J., L. 227. So in *in re Madera* 92 Cal. It was said "while it is held that an apportionment of the expenses for a local improvement is to be made according to its benefits received by the property assessed, yet the power to make such apportionment rests upon the general power of taxation and the apportionment itself does not depend upon the fact of local benefit in any other sense than that all taxes are supposed to be based upon the benefit received by the tax payer. The benefit is not the source of the power." So the legislature may designate the district which will be benefited by the improvements, *Diggins v. Brown*, 76 Cal. 318, or by commissioners appointed to make specific assessments upon the several parcels of land. *Pacific B. Co. v. Kirkham*, 64 Cal. 519; *Keese v. City of Denver*, 10 Colo. 13.

¹⁸ *In Herd v. Amoskeag Mfg. Co.*, 113 U. S. 20.

of proprietors of land adjacent to a stream may be asserted and enjoyed with a due regard to the interests of all and to the public good is within the constitutional power of the Legislature. When property in which several persons have a common interest cannot be fully and beneficially enjoyed in its existing conditions the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of an interest in the property is thereby modified."¹⁹

The origin of this distinction appears to lie deep down in the vitals of the principle that holders of property are under mutual obligation not to use their property so as to injure another, and that a refusal to join in an improvement required for the common utilization of common privileges is an injustice which the law will not suffer. It is a somewhat forced construction to bring the Wright Act with its great machinery of artificial conditions under the scope of this principle.

It is, however, essential to the second vital objection raised that the act must be brought under this principle. For his contention is that as the act vests no authority in the Board of Supervisors to "hear" objections to the petition, or a contest as to its compliance with the statutory requisites of signature by a required number of freeholders.²⁰

¹⁹ After considerable conflict and wabbling in the cases, the New Jersey acts providing for the drainage of swamp lands and the assessment of the cost upon the land owners is upheld, not as an exercise of the right of taxation for a public use or eminent domain as held in *In Re Lower Chatham* 35, N. J. L. 501, and many other cases, but as based on ancient use and analogous to party walls. Such corporations are not public corporations, nor are the assessments enforced referable to power of taxation or eminent domain.

In Re Pequest Rives, 41 N. J. L. 175.

²⁰ The argument of the decision proceeds:

"Not only does the legislation in question provide for the assessing and selling and thus for the taking of private property, in order to supply water for irrigation to specific persons within the district and to those only, but all of this is authorized to be done without affording the owner any opportunity to be heard in opposition to the validity of the proceedings. As has been seen, the act provides as a condition precedent to the organization of the district, the presentation to the Board of Supervisors of the county in which the lands or the greater portion thereof are situated, at a regular meeting of such board, of a petition signed by fifty or a majority of the holders of title or evidence of title to lands susceptible of one mode of irrigation from a common source and by the same system of works as shown by the equalized county assessment roll next preceding the presentation of the petition, which petition shall specifically describe the proposed boundaries of the district and ask that it be organized under the provision of the act. The Supreme Court

of California said in the Madera Irrigation case, 92 Cal., 323, in answer to the present objection to the act that the proceeding for the organization of the district 'does not affect the property of any one within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after the delinquency on his part in the payment of an assessment that may be levied upon his property,' and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard otherwise than by his vote in determining the amount of bonds to be issued or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of assessment thereon becomes final.' A hearing as to what? The only hearing provided for by the statute is as to the correctness of the valuation put by the assessor upon the property assessed. Nor can I at all agree that the proceeding for the organization of the district 'does not affect the property of any one within the district.' The *petition* for the organization of the district was the foundation of the whole proceeding. Without the required petition no step could be taken looking to the organization of the district here in question. It has jurisdictional in the strictest sense. Two weeks' notice of the time of presentation of the petition is required to be given by publication when presented, the statute declares the board of supervisors shall hear the same and may adjourn such hearing from time to time not exceeding four weeks in all, and, on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries; provided, that said board shall not modify said boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by said petitioners which is susceptible of irrigation by the same system of works applicable to other lands in said proposed district, nor shall any of the lands which will not in the judgment of said board be benefited by irrigation by said system, be included within such district; provided that any person whose lands are susceptible of irrigation from the same source may in the discretion of the board upon application in writing to said board have such lands included in such district. Notwithstanding the fact that the petition is by the statute made the basis of the proceeding which is to culminate in diverting the title of the owner of land against his consent, there is here not only no opportunity afforded such owner to test the sufficiency of the petition, for the power of the board of supervisors is in terms limited to making such changes in the boundaries proposed by the petitioners as it may deem proper subject to the condition that it shall not except from the operation of the act any territory within the boundaries proposed by the petitioners, which is susceptible of irrigation by the same system of work applicable to the other lands in said proposed district, nor include within the boundaries which it is required to establish and define within four weeks after the presentation of the petitioners, any lands which, in its judgment will not be benefited by irrigation by the same system of works. Every one must admit that in the matter in question the Board of Supervisors has only such power as is expressly or by necessary implication conferred upon it by the statute itself. Not only is it not thereby given the power to inquire into the sufficiency of the petition, but the express statutory require-

ments preclude any such inquiry by it at the instance of any owner of land adversely affected if at all. Yet the petition may not have been signed by the required number of holders of title or evidence of title to lands within the districts, and if not, there was then no basis upon which the proceedings could rest. Whatever construction might otherwise be placed upon the word 'hear' used in the statute, it cannot be held to include the power to determine the entire merits of the petition in view of the affirmative requirement contained in the same sentence that on its final hearing the board 'shall establish and define such boundaries.' The Board is of necessity required to determine for itself whether the petition upon its face is sufficient to put its powers into motion; yet its determination in that respect is not conclusive upon anyone. Had it been impowered to entertain a contest, for example, by a land owner in respect to the question whether those signing the petition were, in truth, the holders of title or evidence of title to lands susceptible of one mode of irrigation from a common source and by the same system of works, and it should find in favor of the contestant upon that issue, it would necessarily be obliged to deny the petition and dismiss the proceedings. Yet so far from that course being allowed by the statute, it provides, as has been seen, that the Board of Supervisors shall hear the petition, and may adjourn such hearing from time to time, not exceeding four weeks in all, and, in express terms, declares that on the final hearing of such petition it may make such changes in the proposed boundaries as it may find to be proper and shall establish and define such boundaries. After the Board of Supervision shall have so established and defined the boundaries of the proposed district, and shall have divided it into divisions, the Board is by the statute required to give notice of an election to be held in such proposed district for the purpose of determining whether or not the same shall be organized under the provisions of the act. The notice is required to describe the boundaries so established, and to designate a name for such proposed district. In the event two-thirds of the votes cast at such election are in the affirmative, the Board of Supervisors is by the statute required to declare, by an order entered on its minutes such territory duly organized as an irrigation district under the name and style heretofore designated, and to declare the persons receiving respectively the highest number of votes for the several offices to be duly elected thereto, and to cause a certified copy of such order to be immediately filed for record in the office of the county recorder of each county in which any portion of such land is situated; and to mail immediately forward a copy thereof to the clerk of the board of supervisors of each of the counties in which any portion of the district may lie. And the statute declares that from and after the date of such filing the organization of such district shall be complete, and the officers thereof shall hold their respective offices until their successors are elected and qualified. The organization of the district is thus completed according to the statute, without at any time or place affording the owner of any land within the boundaries of the district the opportunity to question or contest the sufficiency of the petition which lay at the foundation of the whole proceedings. From first to last at no time or place is the owner of land within the district given the opportunity to be heard in respect to the essential and all-important question whether the petition upon which all the proceedings rest, and under which his property is to be assessed, sold and conveyed, conforms to the requirement of the statute; whether or not, it is in fact, signed by fifty or a majority of the holders of title or evidence of title to lands within the district,

as shown by the last equalized assessment roll immediately preceding the presentation of the petition. Without such a petition as has been said no step could be taken looking to the organization of the district, (*Milligan v. Smith*, 59 Cal. 206, *Zeigler v. Hopkins*, 117 U. S. 688, 6 Sup. Ct. 919) and of course without a legally organized district there can be no such thing as assessment. To say, therefore, as did the Supreme Court of California in the *Madera Irrigation* case that the land owner 'has opportunity to be heard as to the correctness of the valuation which is placed upon his property and made the basis of his assessment,' does not at all answer the objection. So that, under the provisions of the statute in question, the land of an individual may be assessed and sold, and, according to the averments of the bill will, unless the court intervenes, be conveyed and thus taken, without affording its owner any opportunity whatever to question the sufficiency of the petition upon which the whole proceedings are based. That this would be to deprive such owner of his property without due process of law, would seem to be very clear, in judging what is 'due process of law.' Said the Supreme Court of the U. S. in *Hagar v. Reclamation Dist.*, 111 U. S. 708, 4 Sup. Ct. 663: 'Respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvement, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but, if found to be arbitrary, oppressive and unjust, it may be declared to be due process of law. Assessments in *California* for the purpose of reclaiming overflowed and swamp lands to which the Supreme court of California in the cases cited likened to the irrigation districts are enforced by suits in which, as held by the Supreme Court of the United States in *Hagar v. Reclamation Dist.*, *Supra*, the owner may set up by way of defense, all his objections to the validity of the proceedings, and he is, therefore, in such proceedings afforded 'due process of law.' In the present case, however, as has been shown, the owner whose property is authorized to be taken is not afforded any opportunity whatever, at any time or place, before any board or tribunal, to question the sufficiency of the very thing which lies at the foundation of the whole proceedings. This trial objection to the legislation in question is in no manner answered by the fact that by a supplemental act of the legislature of California, approved March 16, 1889 (86 Cal. 1889, pp. 212, 213) the board of directors of any irrigation district is authorized to commence a special proceeding in a Superior Court of the County in which the lands or some portion thereof are situated in which after the publication of notice of the proceeding, any person interested may come in and contest the legality and validity of 'each and all of the proceedings for the organization of said district under the provisions of the said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale and the sale thereof.' Such a proceeding may or may not be instituted by the board of directors of the district, and was not instituted in the present instance so far as appears from the Bill. No man's constitutional rights can depend upon an option which may or may not be exercised by another."

Evidently if only the power of taxation is concerned no such "hearing" would be required. As the State may form a public corporation for a public purpose against the will of the citizen, and it would in this instance be of no vital importance, whether

the petition was sufficient or not for the effective determinant in the formation of the corporation would be the two-third vote of the legal voters of the district, and since the corporation could be formed in any way the Legislature saw fit, the Legislature would have the discretionary power to make the initiatory proceedings of the petition merely formal,²¹ and the right of the citizen to be heard as to the justice of the assessment of his property would be satisfied by the provision in the act for a hearing before the Board of Equalization. If, however, considered as a special proceeding to enforce a public regulation of private property the statutory requisites be considered jurisdictional, it does not appear that the citizen cannot question the sufficiency of the petition. The statute expressly asserts that they *shall* "hear" the petition and expressly allows them to adjourn for that purpose. How can the Board "hear" the petition and why should they publish a notice of the time and place where it is to be considered unless the citizen is to be granted an opportunity to appear and be heard. If the petition is jurisdictional as asserted, it would be absurd to argue that the statute *compels* the Board to proceed on a void petition. This would be to construe the statute to require all the machinery of act to be set in motion, although all the proceedings are void. A more common-sense interpretation of the statute would seem to give the word "shall" in the clause declaring that "A petition shall be presented * * * signed by the required number of holders of Title," equivalent force with the "shall" in the words "shall hear," and "shall proceed," and to hold that the statute requires the signature of the required numbers; that it does not provide for any other kind of a petition; that the supervisors must discover whether the act is complied with; and that the word "hear"

²¹ *In Re Madera*, 92 Cal. it was said: "The steps provided for the organization of the district are only for the creation of a public corporation to be invested with certain political duties which it is to exercise in behalf of the state. It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. In the absence of constitutional restriction it would be competent for the legislature to create such public corporations, even against the will of the inhabitants. It has as much power to create the district. * * * * It must be observed that such proceeding does not affect the property of any one within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the cause of his assessment."

implies a hearing of any and all objections, including those going to the sufficiency of the petition. As a matter of fact the practice is to hear objections.²²

The decision of Judge Ross is strong but oblique. There is an evident failure to give a full consideration to the cases arising under the Reclamation Act upon whose outlines the Wright act is based, and in whose constitutionality the learned judge acquiesced as one of the Supreme Court of California. While the exercise of the taxing power authorized by the Act may be found constitutional,²³ many of its provisions may be justly criticised as too arbitrary.

The absolute power vested in the Board of Supervisors to include or exclude such lands practically as they see fit²⁴ is capable of great abuse to the detriment of adjacent land owners. There should be a right of appeal to the Superior Court on the ground of an abuse of discretion. So under the amended Section Fifteen of the Act²⁵ ostensibly providing for special elections to provide additional funds for construction purposes, a clause is slipped in allowing the directors to supply the money by assessment even if voters refuse to provide it, so practically placing in their power all the property of the district without any check or control whatever. Cities and towns should not be included without a majority vote of their citizens without reference to the vote of the remainder of the district. The debt which the district can incur should be limited to a reasonable proportion of the valuation of the property of the district.

A more stringent provision should also be adopted defining what sources of water may be sought for irrigation purposes. An act which allows all the land in the taxing district to be voted away to catch possible rain water,²⁶ puts a premium on dishonesty and allows the great public power of taxation vested in trust in the district for the public welfare to be distorted for the benefit of speculators.

The *tendency* of such arbitrary and careless legislation is

²² Board of Directors *v.* Tregea at p. 355.

As to various remedies open to a taxpayer who questions the sufficiency of the petition, see 92 Cal. 334. This objection is also of minor importance because the act may be amended by the legislature so as to explicitly provide for a hearing.

²³ The Irrigation cases are now on appeal before the U. S. Supreme Court.

²⁴ See Board of Directors *v.* Tregea, 88 Cal., 354, where this power is declared final and conclusive beyond appeal.

²⁵ Laws Cal. 1891, page 147, Chap. CXX., viii.

²⁶ See Fallhook *v.* Bradley, Irr. Dis., 68 Fed. Rep. 948.

undemocratic and unjust. Unfortunately legislation, depriving political subdivisions of the right to vote on the question of local improvements for which they are taxed, is on the increase. A law was recently introduced in the legislature of New York vesting in the supervisors of the county the right by an arbitrary vote to force taxation on the state, county and city." If this kind of statutory evolution goes on all the property in the country will be subject to the arbitrary power of "Boards"—and sometimes very wooden ones—of minor officials who are often as ignorant as they are irresponsible; and the taxpayer might as well pay the full value of his property at once into the public treasury and live on such gratuities of provender as these petty magnates see fit to dole out to him.

William P. Aiken.

²⁷ A good-roads bill was put into the bill box by Senator Nussbaum (Rep., Albany) to-day. It provides that boards of supervisors of counties by a majority vote may improve public roads by laying down macadam, telford-macadam roads, or roads of other stone or concrete material. When a board of supervisors decides to improve the highways, a superintendent of roads shall be appointed who shall be a civil engineer and surveyor. Maps of roads are to be prepared by the superintendent and submitted to the board of supervisors and the State Engineer for approval. The superintendent's salary is to be a county charge and the costs of improvements are to be assessed as follows: 15 per cent on the town in which the improvements are to be made, or if in two or more towns a ratable assessment; 35 per cent on the county at large, and 50 per cent on the State."—*N. Y. Ev. Post*, Jan. 23, 1896. So the Good Roads Act of Connecticut taxes, at the instance of the vote of the *town*, both the county and the state. The state votes by the legislature, the town by its citizens, where does the county come in?

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SINCE our last issue incidents of such extraordinary character and events so important in the complications which may follow have occurred, that the beginning of a crisis in international affairs seems to be at hand which may end in the redistribution of the nations of Europe. Nor have these events been confined alone to affairs of the "Powers" of Europe. The United States, after a long period of seeming indifference in their foreign relations, have taken a stand in regard to the disputed boundary between Venezuela and British Guiana which tends toward the enunciation of a national foreign policy, the logical outcome of which no man can foresee. On December 1st, with the exception of the atrocities in Armenia and a couple of land grabbing expeditions, one by the British in Ashantee, and another by the Italians in Abyssinia, profound peace apparently existed throughout the world. On December 17th President Cleveland's bellicose message to Congress led to the beginning of that series of complications which has since involved almost every nation of Europe. As between the United States and Great Britain the newspaper campaign that followed, with no apparent advantage to either side, was remarkable for its acerbity and showed no sign of abatement until Jameson's raid gave the American press a chance to vent its surplus steam and the welcome diversion of the Kaiser's letter turned the thoughts of England in another direction. The inside history of Jameson's expedition will probably never be made public, but coming just as it did, at the

moment when the British press was printing reams upon the subject of American jingos and pointing with pride to British virtue in minding their own affairs, the opportuneness of this piratical raid is little short of providential. The unanimous outburst of hate which immediately showed itself against England has, we believe, finally settled any question of war between us, and furthered arbitration upon the Venezuela dispute, for it is manifest that with all the world in league against her, England cannot afford to stake if not her national existence at least her natural prestige in a war with us upon any grounds so trivial. From all this controversy two apparent advantages have been gained: First, the thorough investigation of the boundary of Venezuela has been set on foot and by the publication of many documents, long kept from sight in state archives, the constant shifting of the British claim always to Venezuela's detriment has been shown. Second, a discussion by press and people of the United States and a clearer definition of what constitutes the Monroe doctrine. Before this controversy arose few people understood the Monroe doctrine and to most it was a name signifying in a general way a safeguard against encroachment of foreign powers in the Western Hemisphere. The result of the discussion may be said to be somewhat as follows: The Monroe doctrine is not a part of International law. This is clear, because Christian nations have without exception, we believe, failed to recognize this doctrine, and International law consists of those rules of National conduct which are prescribed by the common consent of Christian nations and which regulate their intercourse one with another (I. Bl. Comm., pp. 44-58; I. Kent Comm., Lect. 1, pp. 1-4; Woolsey, Int. law, § 5). But still it may be well considered a part of the settled policy of the United States which we have followed pretty consistently since its promulgation and intend to follow in the future. The questions which naturally arise as to the expediency of such an extension of the Monroe doctrine as is contemplated by the Davis resolution now before Congress are two: First, whether such an extension will not virtually constitute us the protector of all the squabbling little Republics of Central and South America; and second, if it does not embody at least a tendency toward the formation of those "entangling alliances" against which Washington warned us.

* * *

THE catalogue of the Law School, which has appeared since our last issue, formally announces the lengthening of the course

of regular study here to three years. Beyond all doubt this is a capital move in the right direction. Every condition favors this action now; the enlarged opportunities and attendance of the school, the vigorous growth of our graduate life—all work in together. It is noticeable that of late older members of the Bar all over the country are appealing for a higher standard in the profession, and are bewailing the hosts of new recruits that are rushed into service with such machine-like rapidity. No man willingly upbraids his own branch of the service, but for this very reason we can hear a peculiar ring of sincerity in the recent words of Judge Field, of the Massachusetts Supreme Court, when he noted the great advance in the standard of other lines of work, and then added with considerable sadness, that this was not true of the Law. It is just here that all our law schools are doing their utmost to create better conditions—and none more vigorously than the school here. There has been of late years a striking growth of graduate life at Yale,—a circle independent of the undergraduate life, a community of men who are trying to do more thoughtful, mature work. The added year of law study falls in very aptly with this tendency. A man who means work may look at a law school course in just two ways—as a sort of manual training school which will carry him through to the bar in the fewest months, or as a period of thoughtful theoretical study which will give him a really deep foundation. Fortunately our schools at Yale and Harvard are making for the latter ideal with a success which is wholly impossible in the rush of a large city like New York.

* * *

THE first decision by Mr. Justice Peckham since his appointment to the Supreme Court embraces a new application of the law of Eminent Domain. During its last session, Congress appropriated money for the preservation of the entire battlefield of Gettysburg as a national park. Various land owners and an electric railway which had received a franchise from the state of Pennsylvania to extend its line upon the field and had actually done so, contested the constitutionality of the act. The case caused a division upon the Circuit Court and was heard in the Supreme Court. Mr. Justice Peckham holds that the act is constitutional on the ground that the battle was a great lesson in military science, that the government desires to perpetuate the lesson and that it may legitimately do so under the power it has to maintain armies and to teach them military science.

THE annual catalogue of the University shows a most encouraging increase in the attendance at the Law School. It also suggests the remarkable growth within the last decade. The number of students enrolled in 1886 was sixty and the faculty consisted of six regular professors and eight special instructors and lecturers. The present membership is two hundred and twenty-five students and the faculty has been increased to ten regular professors and twenty-five special instructors. In view of the proposed extension of the course it is gratifying to note the substantial gain in the number of candidates for the degree of M. L. The range of representation covering nearly every State in the Union is much broader than formerly. This growth has been accomplished with a continually advancing standard of admission. Contemporaneously with its rapid development the School has extended and increased the courses of study, added to its library, established premiums and removed from cramped and unsuitable quarters to its large and commodious building. The object of these comparisons, suggested by the recent catalogue, is simply to emphasize to the friends of the University how splendidly the Law School is justifying its foundation and how worthy it is of their aid and coöperation.

COMMENT.

A recent case which involves the question of a contract in restraint of trade is that of *Consumers' Oil Co. v. Nunnemaker*, 41 N. E., 1048 (Ind.), in which the authorities upon this subject are collected. The plaintiff prayed for an injunction against the defendant to prevent him from pursuing his business of selling oil and gasoline upon the ground of a contract between the parties. From an order sustaining a demurrer to the complaint the plaintiff appealed to the Supreme Court of Indiana. The contract was in substance as follows: That the defendant entered into a written agreement with one Benham, who is described as trustee and manager, by which in consideration of three hundred dollars to him in hand paid, he sold, etc., to Benham or his assigns all his rights in his oil and gasoline business, together with good will and personal property connected therewith, and further contracted and agreed that he (the defendant) would not during the next five years ensuing engage in the business of selling or delivering gasoline in any way within the State of Indiana, the City of Indianapolis excepted. Benham assigned his rights to the plaintiff who brought this action upon the defendant's violation of his contract. Jordan, J., delivered the opinion of the Court.

* * * "It is settled that a contract in general restraint of trade is invalid, but one restraining a party from trading within reasonable limits, so as not to be injurious to the interests of the public, is valid, and may be enforced by an injunction upon a proper showing of facts. *Beard v. Dennis*, 6 Ind., 200; *Duffy v. Shockey*, 11 Ind., 70; *Spicer v. Hoop*, 51 Ind., 365; *Baker v. Fottmeyer*, 75 Ind., 451; *Beatty v. Coble* (at this term), 41 N. E., 390. The settled rule, as enunciated by the American and English decisions of the highest courts, seems to be that where in the particular case before the court, the restraint in controversy, as to territory, appears to be broader or larger than is necessary to the protection of the party seeking to enforce the restrictive contract, it is of no benefit to either party, but in that event becomes oppressive upon the party against whom the enforcement is sought, and, being oppressive, the law regards the restriction as unreasonable and injurious to the interests of the public.

* * * "The law regards the good will of a particular trade or

business as a species of property, possessing a market value, and subject to sale or disposal. But it is also a well-established principle of law and public policy that, where a person is engaged in trading or other legitimate pursuits, he shall not be unreasonably fettered in the exercise of such business, and, when he sells or disposes of the good will incident thereto, the law will only sustain such a restraint as to his future engagement in such business or pursuit as will appear to be a reasonable space of interdicted territory, and what are such reasonable limits is a question of law for the court to determine, under all the facts and circumstances in each particular case. In support of the several general propositions herein asserted, see *Wiley v. Baumgarden*, 97 Ind., 66, and authorities there cited; *Lawrence v. Kidder*, 10 Barb., 641; *Hubbard v. Miller*, 27 Mich. 15; *Horner v. Graves*, 7 Bing., 735; *Navigation Co. v. Winsor*, 20 Wall., 64; *Taylor v. Blanchard*, 13 Allen, 370; *Dunlop v. Gregory*, 10 N. Y., 241; Greenh. Pub. Pol. c. 6, p. 683; 3 Am. & Eng. Enc. Law, 883, and authorities there cited; 22 Am. Law Rev., 873-889; *Mallan v. May*, 11 Mees. & W., 652. In the case of *Dunlop v. Gregory*, supra, the court of appeals of New York said: "Contracts, upon whatever consideration made, which go to the total restraint of trade anywhere in the State, are void. Such contracts are injurious to the public, and operate oppressively upon one party, without being beneficial to the other. * * * The contract, to be upheld, must appear from special circumstances to be reasonable and useful, and the restraint of the covenantor must not be larger than is necessary for the protection of the covenantee in the enjoyment of his trade or business." In the case of *Taylor v. Blanchard*, supra, it was held that an agreement not to set up, exercise, or carry on the trade or business of manufacturing or selling shoe cutters at any place within the Commonwealth of Massachusetts was void. In the case of *More v. Bonnet*, 40 Cal., 251, a stipulation not to engage in a business of a particular kind in the county or city of San Francisco or State of California was held to be void. In *Lawrence v. Kidder*, supra, a covenant not to conduct the business of manufacturing or trading in palm leaf beds or mattresses in the State of New York west of Albany was held to be invalid. In *Price v. Green*, 16 Mees. & W., 346, a contract not to carry on the perfume business within six hundred miles of London was adjudged void. In *Horner v. Graves*, supra, an agreement not to practice dentistry within a district two hundred miles in diameter was held to be void. In *Beal v. Chase*, 31 Mich., 490, where it appeared that the

obligor sold a printing establishment, and the business thereof, which extended over the entire State, a covenant not to engage in the same business in that State so long as the vendee should continue in the business at the place of sale, under the circumstances, was held to be reasonable and valid. In *Rousillon v. Rousillon*, reported in 14 Ch. Div., 351, the English Court of Chancery held that there is no "hard and fast" rule holding contracts of this character, unlimited as to space, void, but that the validity depends upon the reasonableness of the contract; and, where it appears that the broad restriction is reasonably necessary for the full protection of the contractee, it will be sustained. In a recent English decision in the appeal of *Nordenfelt v. Maxim, Nordenfelt, etc. Co.* [1894] App. Cas., 535, where a patentee and manufacturer of guns and ammunition for war purposes transferred his patent to a company, and covenanted with the latter not to engage in that business for a term of twenty-five years, it was held that, owing to the nature of the business, and the limited number of customers to whom sales might be made, confined mainly to governments of countries, the restraint imposed in that case was not larger than was necessary for the protection of the contractee, and not injurious to the public interest."

Viewed in the light of these authorities the contract was decided to be in restraint of trade because if the plaintiff could buy out the defendant and thus restrain him he could proceed to buy out and restrain every other person in the State engaged in a similar business and eventually reduce the sale of oils to comparatively few and thus stifle legitimate competition. Public policy favors competition and is opposed to monopolies which tend to advance prices to the injury of the public in general (*Salt Co. v. Guthrie*, 35 Ohio St., 666; *People v. Chicago Gas Trust Co.*, 130 Ill., 268). This contract is not devisable so as to allow defendant to be enjoined as regards the City of Hammond in which he reengaged in business (*Beard v. Dennis*, supra; *Wiley v. Baumgarden*, supra), and so the restraint of trade under the circumstances being manifestly too large, the contract is in violation of public policy and cannot be enforced.

The litigation over the famous Hocking Valley deal has come to an end with the final decision of the New York Court of Appeals on November 26th, 1895, in the case of *Belden v. Burke et al.* (42 Northeastern Rep., 261). As the outcome of the whole matter Burke and his associates emerge unscathed, and the proceeds of this highly lucrative transaction remain in

the hands of the shrewd operators who worked the road in 1881. The facts which form the basis of this suit are rather ancient history, and it is sufficient to recall simply their outline. In 1881 the Columbus, Hocking Valley and Toledo Railroad was created by consolidation of three smaller companies. The stock of the new road was owned entirely by Burke and four associates. In reorganizing the finances of the system a blanket mortgage was issued of \$14,500,000, of which \$6,500,000 was used to retire the old bonds of the three component roads, while the remaining \$8,000,000 of bonds were put in the hands of Burke to be placed on the market. It is in regard to these latter bonds alone that the present controversy arose, and it is based on the covenant contained in these bonds that their proceeds should be applied to building the road, double tracking, and purchase of new equipment. Actually, however, these bonds were sold through Winslow, Lanier & Co., who were in the deal, and Burke took the proceeds and bought up the whole stock of the Hocking Valley Coal Company. The par value of this block of stock was only \$1,500,000, and at the time it sold at considerably less than par, but this was all that the railroad company ever obtained in exchange for its \$8,000,000 worth of bonds, and the balance remained unaccounted for in the hands of the five directors. Belden brought this action as holder of certain of these bonds which he had bought in open market, to enforce the covenant which is above described, because the Central Trust Company, trustee under the mortgage, refused to bring suit. Judge O'Brien has written a very clear and interesting opinion which sweeps away a great deal of the complication in which the case was enveloped. Of course, as Burke et al. were the sole owners of the company's stock in 1881, a bond holder in Belden's position would be obliged to show that he had been deceived to his actual injury to entitle him to equitable relief. The findings, however, showed that he had suffered no injury for the bonds had proved a paying investment, and beside this that he was not deceived; he was not a purchaser without notice, but had bought after full investigation and with knowledge of the whole transaction, and therefore must, in equity, be deemed to have acted upon and acquiesced in the condition of the security as he found it. This knowledge by the plaintiff, the lapse of time, and long acquiescence, combined with the absence of any actual loss, are the grounds for the refusal of the court to review the transactions between prior owners of such bonds and the railway which had the assent of every party in interest. On this ground the

court refused relief to Belden, thus reaching the same result as the decision of the general term below, but upon a wholly different ground. It is important to note that the court below ruled that Belden's rights were derived solely from Winslow, Lanier & Co., who of course had no right to object because they were parties to the original deal. Judge O'Brien, however, takes pains to say that this is incorrect in principle, and that the rights of a bondholder are not affected by the mere fact that he traces title back to parties who took part in the original transaction. "Subsequent purchasers in good faith and without notice," the court concludes, "are not precluded from relief on the ground that Winslow, Lanier & Co. took the bonds with notice of the actual transaction."

RECENT CASES.

CORPORATIONS.

Corporations—Dissolution—Judgment of Foreign Court.—Scammon v. Metropolitan Trust Co., 42 N. E. Rep., 515 (N. Y.). A judgment was obtained in Illinois against a New York corporation after its dissolution, in accordance with the Illinois statutes which continue a dissolved corporation for the purpose of settling its affairs. Held, that this judgment was void, and that neither the principle of comity nor the provision of the United States Constitution requiring full faith and credit to be given to the judgments of sister States, required the New York courts to enforce it.

Corporations—Preferring Creditors—Rights of Officers—Creditors' Bill.—Mallery v. Kirkpatrick, 33 Atl. Rep., 205 (N. J.). An insolvent corporation cannot under the laws of New Jersey prefer, as a creditor, one of its officers who upon resignation has secured a judgment. A later creditor, framing a bill for the benefit of all the creditors and making the corporation a party, is entitled to a decree that the surplus brought by the property shall be held by such officer in trust for the benefit of all the creditors.

Corporations—Proceedings to Forfeit Charter—Parties—Powers of Receivers.—City Water Co. v. State, 32 S. W. Rep., 1033 (Tex.) The State of Texas brought a suit in the nature of a quo warranto, to forfeit the charter of a certain city water company chartered under the laws of the State. The company set up by way of a plea in abatement, that a receiver had been appointed over the corporation by authority of the United States Circuit Court, and contended that no action could be maintained in the State court against the corporation unless the receiver was joined. Held, that the receiver appointed by the United States Circuit Court for the corporation was neither a necessary nor a proper party to an action by the State to forfeit its charter.

Corporations—Subscription.—B. S. Green Co. v. Blodgett, 42 N. E. Rep., 176 (Ill.). A subscription made by a mercantile corporation in the event of securing the location of a post-office

near its place of business is collectable, since such location being of direct financial advantage to the company constitutes a sufficient consideration.

Foreign Corporations—Loan secured by Mortgage.—*State v. Bristol Savings Bank*, 18 So. Rep., 533 (Ala.) Act 14, Sec. 4, of the Alabama constitution provides that "no foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein." A foreign corporation placing a loan secured by mortgages on land in that State was held to be doing business within the constitution.

Railroad Companies—Foreign Competing Lines.—*State v. Port Royal & Ga. Ry. Co., et. al.*, 23 S. E. Rep., 383 (So. Car.). This was a case where a railroad incorporated under act of Legislature of the State of Georgia, by purchasing a majority of the capital stock and general mortgage bonds of a railroad in South Carolina acquired control of its management and ran it to further its own interests. It was held that a foreign railroad corporation, on the ground of public policy, cannot acquire the stock and thereby the management of a domestic competing line.

Validity of Judgment in a Foreign State.—*Hubbard v. American Ins. Co.*, 70 Fed. Rep., 808. A Nebraska corporation was sued in a Colorado State court, and judgment was rendered against it. The defendant pleaded to the jurisdiction because of insufficiency of service. Recovery on this judgment was sought through the U. S. Circuit Court in the corporation's home state. The latter court held that the judgment was not void, and that the question as to the jurisdiction of the former court in rendering the judgment could not be raised again.

PLEADING.

Election of Remedies—Trespass or Nuisance.—*Follett et al. v. Brooklyn El. R. Co. et al.*, 36 N. Y. Sup., 200. Abutting property owners brought an action against an elevated railway company to enjoin the operation of the road for rental damages. Held, that inasmuch as the plaintiffs had a right to plead and prove the facts upon which their case depended, they could not be compelled to elect whether they would try the cause as for a continuing trespass or as for a nuisance.

Pleading—Equity Amendment.—*Wolverton et al. v. George H. Taylor et al.*, 42 N. E. Rep., 49 (Ill.). This was a suit which had been pending for eight years, and been twice appealed. The Appellate Court sustained the trial court in its refusal to amend the bill at the plaintiff's request, so as to add a new complainant, holding that while such amendment might properly have been allowed in view of the long continuance of litigation, the refusal was no error.

Pleading—Overruling Demurrer—Effect.—*Cummings et al. v. Daugherty*, 18 So. Rep., 657 (Miss.). In an action to recover usurious interest, the defendant demurred, assigning three causes of demurrer, of which the first was overruled and the second and third sustained with leave to defendant to plead to the modified declaration. It was held that a demurrer must be sustained or overruled in its entirety, and the declaration of the plaintiff thus stood unanswered.

WILLS.

Nuncupative Will—Validity—Reduction to Writing.—*Bellamy v. Peelor*, 23 S. E. Rep., 387 (Ga.). In testing the validity of an alleged nuncupative will, if the evidence shows that the maker had time and opportunity to reduce it to writing but failed to do so, the will is invalid.

Wills—Attestation Clause—Berberet v. Berberet, et al., 33 S. W. Rep., 61 (Missouri). The plaintiff asked that a will be set aside as not properly executed because it contained no attestation clause. The court held that if the will was signed by the testatrix in the presence of two witnesses, who subscribed their names in her presence, it was sufficiently evident in what capacity they had signed.

Wills—Construction—Byrne et al. v. Weller et al., 33 S. W. Rep., 421 (Ark.). Where a testator gave his wife a life estate in all of his property and then after certain bequests gave the remainder of the land to his wife to dispose of as she might choose at her death, it was held that by virtue of the last clause, the wife held a fee in the residue of the land.

Wills—Revocation—Presumption.—*Boyle v. Boyle et al.*, 42 N. E. Rep., 140 (Ill.). This was a petition for the revocation of letters of administration on the estate of Joseph Boyle, deceased, brother of both parties to the action, and for the probate of an

alleged will of said decedent. Evidence established the fact that deceased, in presence of plaintiff and in favor of his son, had executed a will, leaving same with an attorney for safe keeping; that later and in company with defendant, deceased had called for the will, which was never seen again. The court declined to admit said will to probate, holding that under the aforementioned circumstances, the presumption prevailed that it was destroyed by the testator or under his direction.

MISCELLANEOUS.

Collision between Sailing Vessels—Holding Course—Duty to Lie By—Drowning of Seamen.—*Crowell et al. v. Grant et al.*, 70 Fed. Rep., 270. Between a vessel sailing free and one sailing close-hauled the former is obliged to make way. If she fails to change her course and damage results she is liable. Failure to lie by on the part of the uninjured vessel is a breach of duty which renders said vessel liable for the death of the seamen, and the executors of said seamen may collect damages for physical and mental suffering experienced while drowning.

Collision of Steamboats in Channel—Rights of Cargo Owners.—*Canton Ins. Co. v. Claimants of the Victory*, 68 Fed. Rep., 395 (Va.). The loss occasioned by the collision of two steamers, occurring in a river channel and in the day time, thus resulting from evident mismanagement, falls upon the vessels and not upon the cargo owners. The latter have rights which are distinct from those of the vessel owners and are entitled to complete indemnity.

Conspiracy Against Fellow Workmen—Civil Action.—*Clemitt et al. v. Watson*, 42 N. E. Rep., 367 (Ind.). An agreement made by workmen to quit work unless their employer discharge a man objectionable to them, is lawful. No personal liability is incurred in civil or criminal action for the carrying out of such an agreement, in the absence of any threats, violence or intimidation.

Contract with State—Assignment.—*Carter v. State*, 65 N. W. Rep., 422 (S. D.). Where the commissioner of public printing contracted with a firm to do the public printing for the term of one year, and the firm assigned the contract and the assignee sued the State for damages for the breach thereof; it was held that there being no statutory provision to the contrary, such a contract was assignable.

Criminal Law—Club Room—Gaming House.—Commonwealth v. Blankinship et al., 42 N. E. Rep., 115 (Mass.). Complaint charged defendant with being present in rooms used as a common gaming-house. Defendant answered that there was no cause of action since rooms were those of a private club. Held that club rooms used for gambling, by members and their invited guests, is a common gaming house, "common" in this connection not necessarily meaning open to all the public.

Homicide—Murder and Manslaughter—Resisting Arrest—Instructions.—Brown v. United States, 16 Supreme Court Rep., 29. The defendant killed two officers, who mistaking him for another person, were unlawfully attempting his arrest. The trial judge charged the jury that such killing was not murder but manslaughter, "unless done in such a way as to show brutality, barbarity and a wicked and malignant purpose. If done in this way it would be murder." Held, that this instruction was erroneous, since it allowed the jury to bring in a verdict of murder because of the manner of the killing, even though apart from the way in which life was taken the facts made a case of manslaughter.

Libel and Slander—Charging Bribery of Voters—Identification of Plaintiff—Instructions.—Van Ingen v. Mail and Express Co., 35 N. Y. Sup., 838. It was stated in the defendant's newspaper that 'the London head of a large New York firm of cloth jobbers' was the leader of a movement to raise funds abroad to buy votes. Such publication was held libelous *per se* and was none the less libelous because the accusation did not designate the plaintiff by name. Extrinsic evidence was held admissible to show that the article referred to the plaintiff.

Railroad Foreclosure—Receivers—Unsecured Debts.—Wood v. N. Y. & N. E. Ry. Co. et al., 70 Fed. Rep., 741 (Mass.). A claim for a debt contracted for the supply of materials necessary for the operation of a railroad from day to day "as a going concern" was held to be within the classes of preferred claims to be paid by the receivers out of the income of the road. In order to sustain a preferred claim the creditor must show that the materials supplied were necessary to keep the road a "going concern" and were indispensable to the safe carriage of the public.

Street Railroad—Injury to Passengers.—Waiver of Statutory Immunity.—Vail v. Broadway R. R. Co., Brooklyn, 42 N. E. Rep.

4 (N. Y.). The plaintiff while smoking upon front platform of a Broadway car was injured. The company claims immunity from liability upon the ground that there was a notice inside the car prohibiting passengers from standing on platform. Held that the rule "Smoking on closed cars is prohibited, except upon the front platform," modifies such notice and operates, in case of injury to a passenger smoking upon the platform, as a waiver of immunity from liability, conferred by General Railroad Act of 1850.

Tug Boats—Collision—Rodgers v. Adriatic Fire Ins. Co., 69 Federal Reporter, 157. Both tugs are held liable for damages in a collision resulting in sinking of a tow, when both were inattentive in regard to signals and failed to keep a permanent look-out while going in opposite directions in Long Island Sound. The Assurance Co. holding the liability on the sunken tow can recover from both, as each was equally at fault.

BOOK NOTICES.

Walker on Patents. Third edition. By Albert H. Walker of the Hartford Bar. Sheep. Price \$6.50 net, or \$6.75 delivered. Baker, Voorhis & Co., New York, 1895.

This book of 850 pages differs from all other standard American patent-law text books in being five years later than the latest of the others and in embodying the relevant points of the Judiciary Acts of 1891 and 1893. Its author has enriched it by incorporating into the text more than a thousand points of law which have been extracted from some seven hundred newly-cited decisions which have been rendered since the second edition was published. Mr. Walker's wide experience as a practitioner and his remarkable ability for clearness of expression have enabled him to state in this work in a clear and concise form, points of law which required elaborate discussions in the second edition because they were not then settled by the courts. In revising the text that it might conform to the present condition of the law some old sections have been discarded while new ones have been added. All through the author has aimed at bringing this very intricate subject into as clear, concise and practical a form as possible. The recognition of the author's books on patents as authority, is indicated by the fact that during the twelve years since the publication of the first edition, it has been cited in the Federal Courts as an authority in nearly a hundred different decisions, being a far greater number than that of any other English or American patent-law text-book. Every lawyer should have this latest standard work in his library.

A Treatise on the Law of Former Adjudication. A complete analysis of all the Precedents and Principles concerning the effect of Judicial Decrees, Judgments, Orders and Sentences upon the Rights of Parties, Privies and Strangers, in Other Judicial Proceedings, either Civil, Criminal or Ecclesiastical. By John M. Van Fleet, author of "Collateral Attack on Judicial Proceedings." Two volumes. Sheep. The Bowen-Merrill Company, 1895.

To discuss the law of *Res Judicata*, or, in fact, any special legal topic, in a work comprising two large quarto volumes with-

out a manifest tendency to inflate in the interest of bulk requires a comprehensive knowledge of the whole subject, in all its varied aspects. The author of these volumes gives abundant evidence of the possession of the requisite qualities. His former work along similar lines has peculiarly fitted him for the task just completed. His treatment of the subject is broad and philosophical, and is at the same time, sufficiently based upon the practical application of rules in reported cases, to be of use to the lawyer in the practice of his profession. The matter is arranged in convenient form under the following five titles: Principles, Analogies, Comparisons, Definitions and Final Judgments; The Merits in Civil Causes; Parties, Privies and Strangers; Crimes and Criminal Proceedings; Second Appeals—Pleadings in Civil Causes. Under each chapter the headings of the paragraphs are in alphabetical order, thus obviating the necessity of frequent recurrence to the index when using the work for reference purposes, although the general index is a very good one. The more important cases, notably *The Duchess of Kingston's Case*—The leading one on the subject of former adjudication—and the authorities cited therein, are stated and discussed at considerable length in the text. This feature is carried to an unusual extent, and will be appreciated by the reader who has not frequent access to a large library. The matter and form of the work are alike satisfactory, and the author may be credited with having done much toward the elucidation of a difficult subject. The pages, binding and typography are creditable to the publishers.

A Treatise on Land Titles in the United States. By Lewis N. Dembitz of the Louisville Bar. Two volumes. Sheep. Price \$12.00, delivered. West Publishing Co., St. Paul, Minn., 1895.

This exhaustive work upon our land titles by the author of the well-known *Treatise on Kentucky Jurisprudence*, will, we are sure, be gladly received by the American bar. It is the mature fruit of three years of unremitting toil in a field of unspeakable tangles and perplexities. It is distinctively a book for the active and busy practitioner of to-day. Leaving the origin and early developments of the law of real property to those who have preceded him, the author "undertakes to trace its growth and changes only on the western side of the Atlantic," from the time of the Colonial charters, on the one hand, and of the *régimes* of France and Spain, on the other, down to the present day. During the course of this long period, this body of our jurisprudence has undergone many and striking changes. The clear-cut unity

which we received from our English forefathers has been wrought upon, split up and well-nigh metamorphosed by the statutes and judicial determinations of more than two score of independent sovereignties, so that now the law of any given State cannot be determined by reference to the law of England or of any of the sister States. It is the special credit of Mr. Dembitz that he has thoroughly collated, and, as far as possible, harmonized all the statutes and decisions of the various States and Territories of the Union. It is to be noticed that this is not a treatise on the *general* law of real property. "It deals only with the title, or incumbrances upon it, not with the personal obligations that may arise between owner and possessor, landlord and tenant," etc. Hence the mode of regaining possession is not considered. Incorporeal hereditaments, are also outside the general scope, the treatise being confined to land.

Foster on the Constitution. Commentaries on the Constitution of the United States, Historical and Judicial, with Observations upon the Ordinary Provisions of State Constitutions, and a Comparison with the Constitutions of other Countries. By Roger Foster, of the New York Bar, author of *A Treatise on Federal Practice*, and Lecturer on Federal Jurisprudence at the Yale Law School. Volume I., 716 pp. Sheep, \$5.00 net; cloth, \$4.50 net. The Boston Book Company, Boston, 1895.

This is at once a complete constitutional history of the United States and a compilation of all the precedents which aid in the construction of the Federal Constitution. The author narrates the proceedings in the Federal Convention leading to the adoption of the Constitution; compares it with the provisions upon the same subject in the constitutions of the different States and foreign countries; describes the historical precedents upon its construction and collects all judicial decisions upon this point. He presents fully the result of recent researches into the sources of the constitution and the intentions of its powers; and discusses at length the theories of nullification and secession, the constitutional history of the Confederate States, the reconstructive measures, and later developments bearing upon the interpretation of the constitution, all in a spirit of judicial impartiality. The first volume terminates with the subject of impeachments, and this topic is treated in a most thorough and comprehensive manner.

MAGAZINE NOTICES.

The Albany Law Journal, 1895-6.

- Dec. 7.* Legal Education, . . . By the Lord Chief Justice of England
Dec. 21. Report of the Commissioners of Code Revision,
Dec. 28. Report of Commissioners—Continued, . . .
Jan. 4, 1896. Report of Commissioners—Continued,
Jan. 11. Naturalization of Aliens, . . . Ben. S. Deane
Jan. 18. Decision in the *Armes Case*, . . .
Feb. 1. Report of Committee on Revision of Statutes. Daniel L. Remsen

The Green Bag, January, 1896.

- The New Supreme Court Justice, Rufus W. Peckham, . . . A. Oakey Hall
 The Will of a Great Lawyer, . . . Sallie E. Marshall Hardy
 The Indian Wife, . . . R. Vashon Rogers
 The Supreme Court of Maine, . . . Charles Hamlin
 The Lawyer's Easy Chair, . . . Irving Browne

Harvard Law Review, January.

- Justice According to Law, . . . Frederick Pollock
 A New Nation, . . . Hollis R. Bailey
 Federal Restraints upon State Regulation of Railroad
 Rates of Fare and Freight, . . . William F. Dana

February, 1896.

- Hamlyn & Co. v. Talisker Distillery, . . . William Schofield
 Lottery Bonds in France and in the Principal Countries of
 Europe, . . . Henri Levy-Ullmann
 The Recognition of Cuban Belligerency, . . . J. H. Beale, Jr.

Central Law Journal, 1895.

- Dec. 6.* The Action for the Malicious Prosecution of an
 Ordinary Civil Action, . . . Spencer Haven
Dec. 13. Sale of Real Estate Equities of Holder of option
 Upon Destruction of Premises, . . . William L. Murfree, Jr.
Dec. 20. Common Law Pleading, . . . Linton D. Landrum

January, 1896.

- Jan. 3.* Is a Cause of Action for a Statutory Penalty
 Assignable? . . . William L. Murfree, Jr.
Jan. 10. Services whose Performance is Excused by Sick-
 ness or like Disability, . . . Nathan Newmark
Jan. 17. Eminent Domain—Rights of Tenants, . . . D. H. Pingrey
Jan. 24. Assignment for the Benefit of Creditors as to
 Property Beyond the State in which the
 Assignor Resides and Makes the Assign-
 ment, . . . D. B. Van Syckel
Jan. 31. The Law of the Case, . . . R. R. Bigelow
Feb. 7. Liability of Employers for the Negligence of
 Contractors, . . . Wm. Rogers Clay

YALE LAW JOURNAL

VOL. V

MARCH, 1896

No. 4

THE RESPONSIBILITIES OF THE UNITED STATES, INTERNATIONALLY, FOR ACTS OF THE STATES.¹

Should one of our States, by its act or default, offend either a sister State or a foreign power, and a definite legal obligation be thereby created, a remedy is offered by the Constitution and laws of the United States, through an ordinary civil action. The offended power may sue the offending power in the Supreme Court of the United States, and justice may be enforced through the process of that tribunal, in precisely the same manner as if the defendant were a private individual.

A suit can now be brought against a State by a citizen of another State or country only by the defendant's consent, since it has, in this respect the ordinary immunity of a sovereign. Some States have enacted general laws constituting a tribunal with jurisdiction to hear and adjudicate demands against the public treasury; and in all a sufficient remedy for any wrongful act done under claim of public authority is often afforded by an action against the officer who committed it, sued as an individual trespasser, with no reference to his official character. He must then justify under some law or public mandate, and the validity of this justification it will be for the court to determine.

But if no definite legal obligation has been created by the act or default of a State, of which complaint is made, there can in no case be any judicial remedy, whether in favor of another power or of a private individual. Wrong may have been done, but the question of redress becomes merely a political one.

¹ In the preparation of this notice free use has been made of a paper by the author—"de la responsabilité du pouvoir fédéral aux États-Unis au cas où les États particuliers s'abstiennent de réprimer les délits commis sur leur territoire"—which appeared in the *Revue du Droit public et de la Science politique en France et à l'étranger*, for Nov.-Dec., 1895.

If the complaint comes from another power, the injury to the offended sovereign may be of the kind just considered, that is, to him only because it is an injury to one of those whom he is bound to protect, and the individual so injured may often find an adequate remedy by a private action against the particular officer or citizen of the offending State who did the wrongful act. Such a suit, whether by a citizen of another State or by a foreigner, may be brought in the courts of the United States, and the defendant could not justify under any authority from his own sovereign, which was in derogation of the plaintiff's rights.

But if the injury to the offended sovereign be one of a political character, or one which cannot be made good by money, or if it be one which he is unwilling to submit to judicial determination, there can be no relief except through the voluntary concession of the State, or the intervention of the United States, acting through their executive or legislative authorities.

So far as the enforcement of contracts of any sort, executory or executed, is concerned, the United States are under no other obligation than that of affording the creditor, if a sovereign power, a remedy in their courts, by an ordinary civil action; and should he recover judgment, its collection would depend on the amount of the property of the State which was subject to judicial sequestration.

Each State, being a political and corporate unit, binds itself only by its contracts. Those who choose to trust it do so upon its own credit.

But the positive, wrongful acts of a State, other than defaults of contract obligations, stand on ground wholly different. So far as they affect another State, or its citizens, they often call justly for redress at the hands of the general government.

If the citizen of one State is denied in another the same commercial privileges or immunities which it concedes to its own citizens, the courts of the United States stand ready to vindicate his right.

If, to take a case of a more general character, one of the States should, in the absence of due authority from the President of the United States, march a body of its armed militia into or across a neighboring State without asking and obtaining its assent, adequate redress (other than by forcible resistance) could only be obtained by appropriate legislation at the hands of Congress. The United States, by their Constitution, are to guaranty to each State a republican form of government; and a republic, which can be invaded by armed troops without its own consent,

is a republic no longer. Congress, it would seem, could therefore make such acts an offense against the United States, to be repressed by the strong hand, or punished by judicial sentence.

That comity and equality of right and interest which exists between the States of the Union has generally been found sufficient to prevent the occurrence of such political difficulties or misunderstandings. But with respect to foreign powers, the circumstances are obviously different.

Let us examine some of the instances in which international questions have arisen from the act or default of a State.

Some sixty years ago an insurrection in Canada was supported by supplies received from ports on the New York side of Lake Ontario. The Canadian authorities undertook to seize the *Caroline*, an American vessel engaged in this illicit trade, within the territorial jurisdiction of New York. An engagement ensued, in which an American was killed. A Canadian, named McLeod, was indicted by the grand jury in a State court of New York for the homicide, on a charge of murder. Not long afterwards he incautiously ventured across the border and was placed under arrest. The British Government, which had ratified the expedition of the Canadian authorities, instructed their minister at Washington to demand his release. While the Department of State at first denied any responsibility in the matter, and then temporized, the President used every endeavor to secure the prisoner's discharge by the voluntary action of the State authorities. They declined to interfere with the ordinary course of judicial administration. A citizen of New York had been killed and it was for the State of New York to punish such an infraction of public order. If there was a defense on the ground of military orders, let it be made at the trial.

Such an attitude on the part of the State put the United States in a most disagreeable position. They represented to the British minister that under American law, all ordinary criminal jurisdiction belonged to the States, and that the statutes of the United States conferred upon its officials no power to coerce a State to discharge a prisoner under indictment. This was true, but it naturally proved unsatisfactory to the British government. They had no relations with the State of New York. They had relations with the United States, and it was from them that they demanded McLeod's release. No other course was open to them.²

² See Chief Justice Taney's opinion in *Holmes v. Jennison*, 14 Pet. 540, 573, 577.

They were represented in the United States only by a minister, accredited to the United States, and the Constitutional prohibition against all agreements between any State and a foreign power, impliedly excludes all diplomatic negotiations which might be directed towards securing such an agreement.

An attempt was made to secure McLeod's discharge upon *habeas corpus* proceedings in the State courts, but it was unsuccessful.³

This decision was not received with satisfaction by the bar of the Union.⁴ There can be no doubt that a private soldier is not liable to indictment for an act of war, performed by the order of his military superiors. The attack on the *Caroline* might have been an unjustifiable invasion of the territory of the United States, but when the British government assumed the responsibility for it, it became an international matter, too large to be settled or to be dealt with by proceedings of a criminal nature before a State tribunal.

During the progress of the cause, Daniel Webster succeeded Mr. Forsyth as Secretary of State, and in instructing the Attorney General to aid in the defense, acknowledged explicitly the justice of the British claims. "All that is intended to be said, at present," he wrote, "is that since the attack on the *Caroline* is avowed as a national act, which may justify reprisals, or even general war, if the government of the United States, in the judgment which it shall form of the transaction and of its own duty, should see fit so to decide, yet that it raises a question entirely public and political; a question between independent nations, and that individuals concerned in it cannot be arrested and tried before the ordinary tribunals, as for the violation of municipal law. If the attack on the *Caroline* was unjustifiable, as this government has asserted, the law which has been violated is the law of nations, and the redress which is to be sought is the redress authorized, in such cases, by the provisions of that code.

"You are well aware that the President has no power to arrest the proceeding in the civil and criminal courts of the State of New York. If this indictment were pending in one of the courts

³ McLeod's Case, 25 Wend. 482; 1 Hill, 377; 37 Am. Dec. 328.

⁴ See the criticisms of Judge Talmadge, 26 Wend. 663, and reply to these, 3 Hill, 635. Mr. Webster, in 1846, referred to the opinion of the Court, during a debate in the Senate of the United State, as not a "respectable" one, either in its reasoning or its conclusions. Lord Lyndhurst inclined to a different view, if we can judge from an informal expression of opinion quoted from Greville's Memoirs, 3 Whart., Int. Law Dig. 321.

of the United States, I am directed to say that the President, upon the receipt of Mr. Fox's last communication, would have immediately directed a *nolle prosequi* to be entered.

* * * * *

"It is understood that McLeod is holden also on civil process, sued out against him by the owner of the *Caroline*. We suppose it very clear that the Executive of the State can not interfere with such process, and, indeed, if such process were pending in the courts of the United States, the President could not arrest it. In such, and many analogous cases, the party prosecuted or sued must avail himself of his exemption or defense by judicial proceedings, either in the court into which he is called or in some other court. But whether the process be criminal or civil, the fact of having acted under public authority and in obedience to the orders of lawful superiors, must be regarded as a valid defense; otherwise individuals would be holden responsible for injuries resulting from the acts of Government, and even from the operations of public war."^a

The trial of McLeod for murder at last came on. At the request of the Governor of New York, the Chief Justice of the State presided. The United States virtually assumed his defense, and both the District Attorney and the Attorney General were present during the proceedings. England had sent over additional troops to Canada and it was well understood that the most serious consequences might follow in case of his conviction. The Attorney General had been specially instructed in that event to sue out a writ of error from the Supreme Court of the United States. Much to the relief of the government, however, McLeod was acquitted on the plea of an *alibi*. The Secretary of State then urged upon Congress the passage of a statute giving the Judges of the courts of the United States power to discharge by writ of *habeas corpus* prisoners held under State authority, in contravention of the laws or international obligations of the general government. Such an act was promptly passed and is still on our statute books (Aug. 29, 1842, 5 U. S. Stat. at Large, 539; Rev. Stat. sec. 753).

Another instance of the interposition of the United States, to occupy what would otherwise be part of the domain of the State Governments in order the better to meet their international responsibilities, is afforded by the Acts of Congress of 1884 and 1891, in regard to the counterfeiting of securities of foreign gov-

^a Webster's "Diplomatic and Official Papers," 135.

ernments (23 Stat. at Large, 22; 26 Stat. at Large, 742). Some years ago it was discovered that the country was becoming the seat of extensive forgeries of that nature. This was a matter of little concern to the several States. They were under no international obligation to interpose. It was otherwise with the general government. The golden rule is a proper canon of international law for nations which may choose to adopt it. Congress enacted a law, making such forgeries highly penal. A prosecution was brought against one Arjona, for its violation. His counsel argued that such legislation transcended the powers of Congress, because it could legitimately be had at the hands of the State, in which the forgery was committed. The case came, on appeal, before the Supreme Court of the United States, and it was there held that whether the State had or had not made the act penal, Congress could. If the treasury notes of the United States were being counterfeited, in a country with which they had diplomatic relations, they could reasonably treat it as an unfriendly act, if, on calling the matter to the attention of the government, it was not repressed. "But," said the Court, "if the United States can require this of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other. A right secured by the law of nations to a nation, or its people, is one the United States as the representatives of this nation are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the Government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the States. Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a State from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a State, as well as that of the United States."⁶

The New Orleans incident of 1891 has given a new point to these observations.

⁶ *United States v. Arjona*, 120 U. S. 487.

Mob violence to foreigners is in all countries a frequent cause of international differences. In most, the government whose peace was broken is the only government concerned. It was its business to prevent the disorder. It is its business to answer for its failure to prevent it, and the consequences which have ensued.

But in the United States it is rare that a riot infringes any of their laws. It may, if it results in obstructions to commerce between the States or with foreign countries, or if it is in direct contempt of the Federal authority. But in the great majority of cases rioters are only guilty of violating the peace and order of the State.

Such has been the fact with respect to the attacks made from time to time in some of the Territories or States of the far West on Chinese or Italian laborers, and to the assassination of the Italian prisoners in the jails of New Orleans.

Upon the happening of some of these outrages, however, particularly in recent years, demands for satisfaction have been made upon the United States by the government whose subjects were the sufferers. In each the United States have disclaimed any responsibility. In several, however, they have made pecuniary compensation from the national treasury, offered as a gratuity and received as a right.¹

¹ On February 3, 1896, the President sent a special message to Congress in reference to the massacre of a number of Italian laborers at Walsenburg, Colo., in March, 1895, which had been brought to his attention by the Italian ambassador, and recommended an appropriation for their families in these words: "Without discussing the question of the liability of the United States for these results, either by reason of treaty obligations or under the general rules of international law, I venture to urge upon the Congress the propriety of making from the public Treasury prompt and reasonable pecuniary provision for those injured and for the families of those who were killed." He also transmitted a copy of a letter on the subject to him from the Secretary of State, in which Mr. Olney uses this language: "The facts are without dispute, and no comment or argument can add to the force of their appeal to the generous consideration of Congress. Three persons were killed outright, while two others sustained injuries of a character the most disabling as well as painful. The only question would seem to be as to the amount of the gratuity in each case, which must rest, of course, wholly in the discretion of Congress, to whom it can hardly be necessary to cite the statutes of many States of the Union fixing the maximum to be exacted in the case of a death caused by negligence at the sum of \$5,000."

The message also showed that the President had requested the Governor of Colorado (A. W. McIntire, Class of 1875, Yale Law School) to endeavor to procure the summoning of a grand jury from some distant part of the State to pass upon indictments which were to be presented against some of those involved in the massacre, but that that had been found impracticable under the laws of Colorado.

For such offenses there is often practically no redress in the States where they are committed. They naturally occur in communities where social conditions are new or unsettled; where might makes right; where there is class feeling and class organization.

New Orleans is one of the oldest of American cities, but it is the market of a great stretch of territory, where the capital and intelligence are in the hands of a few, surrounded by a mass of ignorant laborers, led often by vicious and unprincipled men. Society has been there too often kept within bounds by the pistol rather than the jail. It is also in large part a foreign city. The "French quarter" is as un-American as if it were in the heart of Paris, or, rather, of the Paris of the days of the first empire.

In 1850 it was the scene of a riot in which the property of a number of Spaniards was destroyed, in retaliation for the execution at Havana of several Americans who had gone there to aid the Cubans in a contest for independence. Spain presented a claim for indemnity against our government. We declined to recognize its justice, but on the recommendation of the President Congress in 1853 made an appropriation to satisfy it.*

In 1890 the cotton handlers at the New Orleans docks struck for higher wages. The local trades-unions, butchers, bakers, milkmen and street railway operatives, struck in aid of them. For two days no street cars ran, no milk was served, no fresh provisions were on sale. Then a call appeared in the morning newspapers for a meeting of the Committee of Safety. This, if the newspaper reports may be trusted, is or was a body of fifty of the leading citizens, organized for such emergencies, but ordinarily dormant. Its deliberations are secret; its actions prompt. A sub-committee of its members soon called upon the leaders of the strike and informed them that if it were not called off by six o'clock on the next morning they would be held "personally responsible." This is an euphemistic phrase well understood in that connection at New Orleans. It signifies death. The chairman of the sub-committee was the President of one of the largest concerns in the city. They meant what they said. The strikers understood them. At six o'clock the next morning the milkmen were at the door, and the strike was over.

The massacre of the Italians in jail in 1891 was countenanced, and it might almost be said committed by men of the same high standing in the community. They justify it by the law of neces-

* 3 Whart. Int. Law Dig. § 226.

sity. Perhaps the validity of the plea cannot fairly be judged by those who live under different social conditions. But, be this as it may, it is evident that a trial of such men before the courts of their own States, for a homicide committed under the auspices of the Committee of Safety, would be only a form of declaring their innocence.

It is equally evident that a foreign power, whose subjects had been the victims of the outrage, and which would be bound to answer directly to the United States, were an American citizen killed in an anti-American riot within its territory, would find it difficult to be contented with the result of any such local prosecution. Particularly would this be true, where by treaty it had agreed with the United States that each should afford due protection to the persons and property of citizens of the other power, when within its jurisdiction. The fact that a civil remedy existed in favor of the heirs of the persons massacred and under certain conditions could be had in the Federal Courts^{*} would not be accepted as offering a sufficient atonement for the wrong. Public justice would be expected, and, if possible, required.

Considerations of this nature have recently led Congress to inquire into the practicability and expediency of giving the Courts of the United States cognizance of crimes of this character.

Their attention was called to it by President Harrison in his annual message in December, 1891, in connection with the information which he communicated regarding the New Orleans massacre, and legislation recommended in these words:

"Some suggestions growing out of this unhappy incident are worthy the attention of Congress. It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal Courts. This has not, however, been done, and the Federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as Federal agents as to make this Government answerable for their acts, in cases where it would be answerable, if the United States had used its constitutional power to define and punish crimes against treaty rights."

^{*} *Comitez v. Parkerson*, 50 Fed. Rep. 170; 56 Fed. Rep. 556.

The only express grant in the Constitution of power to Congress which could be claimed to cover such an Act as the President suggested, is that (Art I. Sec. 8) as to the definition and punishment of offenses against the Law of Nations. This would seem entirely adequate, for that law rests largely upon principles asserted or recognized by treaties, and considers the infraction of any engagement of that character as a legitimate cause of war.

A treaty with us also being a law as well as a contract, Congress has the same right to punish all who may offend against its provisions that it has to punish those who violate statutes of its own enactment. *Logan v. United States*, 144 U. S. 263, 283.

The judicial power of the United States is declared to extend to all cases in law and equity arising under their Constitution or laws, or treaties made by due authority. Already, by act of Congress, an indictment for murder in a State court can be removed at the will of the defendant, into a court of the United States for trial, if his defense rests on a claim of authority derived from the United States. There are certainly strong grounds for asserting that it is equally within the competency of Congress to invest those courts with power to adjudge whether by any act of violence an international or treaty obligation of the United States has been wrongfully infringed on American soil.

The Fourteenth Amendment to the Constitution appears to lend new support to this position, in its prohibition against the enactment or enforcement by the States of laws to deprive any person within their jurisdiction from receiving the equal protection of their laws. If violence is committed against foreigners, *qua* foreigners, in any State, by its authority, the United States might claim with great force that under this Amendment they have the power to redress it. But such action—directed against the enforcement of a State law—would seem to derogate much more from the sovereignty of the State, than action taken against individual wrongdoers, who attack foreigners as such, without law.

Resident or visiting aliens, who are subjects of a friendly power, so long as they are permitted to remain, may well claim that they are entitled to the aid of the government within whose jurisdiction they find themselves, so far as is necessary to the security of their persons and property, as fully as it is given to its own citizens. (Cf. U. S. Rev. Stat. Sec. 5299).

The people of the United States in distributing sovereign power have seen fit to leave to each State the duty of preserving order within its territory. But they have seen fit also to make

the government of the United States their sole representative with respect to all matters of international intercourse and diplomatic negotiation, and to the United States only, therefore, can a foreign power look for satisfaction, in case of an injury to its subjects, committed within any State.

An American citizen owes a double allegiance. He is a citizen of his State as well as of the United States. He can commit treason against either or both. He is entitled to protection from each. But if he is molested when traveling abroad by a foreign power, or by subjects of a foreign power with its connivance or in consequence of its default, reparation will be demanded by the United States, and not by the State to which he belongs.

As was said by the court in the *Arjona* case, above quoted, the United States have inherent power to defend their international obligations, and whatever right they may possess by the general principles of international law against any other nation, a similar right that nation possesses against them.

If an American State, upon whose soil wrong is done to a foreigner, has done what it can, and what international law demands of a sovereign power, to prevent or redress the wrong, the United States may well repose upon the action thus taken as a sufficient answer to any diplomatic claims for reparation. But if such action has not been taken by the State; if its officials extended no protection, and its tribunals afford no redress, or afford it only in form, the question becomes a pertinent one, as is suggested in President Harrison's message, whether the people of the United States, in constituting and bounding their depositaries of power, have failed to provide for the consequences of such defaults. Have they created themselves a nation for international purposes, with the power to contract, but not to discharge international obligations?

The territory of each State is also the territory of the United States. Each government has a police power, commensurate with its necessities. That of the United States has been exerted since the Civil War in many directions which before were deemed not open to it. By one Act of Congress it has been extended to the prevention of fraud at State elections, at which ballots are also cast for persons to hold office under the Constitution of the United States; by another, to the regulation of every harbor on the coast. The expediency of legislation of this description is a matter of Congressional discretion; its validity has never thus far been successfully disputed.

If the United States are thus asserting national prerogatives

for the better security of the domestic and internal interests committed to their charge, may they not with propriety be expected to proceed in a similar direction for the discharge of their obligations to foreign powers?

The American Bar Association at three of its recent annual sessions, made this subject a matter of deliberation; but ultimately declined to make any declaration of opinion as to whether further legislation by Congress was, or was not desirable."

Among the measures discussed before that body was the draft of an Act of Congress, in the following form:

"AN ACT

"to enforce treaty provisions for the protection of foreigners against acts of violence.

"Be it enacted by the Senate and House of Representatives of the United States, in Congress assembled:

"Section 1. If any act of violence shall be committed within any State or Territory of the United States against the person or property of any citizen or subject of a foreign Government, between which and the United States there exists a treaty at the time, and such act is one which would constitute a crime or misdemeanor at common law, but is not an offense prohibited, or the punishment whereof is otherwise specially provided for by any statute of the United States; and if the party committing said act is not arrested and held for trial within six months after its commission, under the laws of such State or Territory; then, should the Minister or other accredited diplomatic representative of such foreign government complain to the Secretary of State of the United States, that said act, or the omission to hold for trial the party committing the same was an infraction of such treaty, the President of the United States may, if he be of opinion that there are grounds for such complaint, direct criminal proceedings to be instituted against such party, in the proper Courts of the United States, holden within said State or Territory.

"Section 2. In any proceeding so instituted by direction of the President, the act committed by the party accused shall subject him to the same punishment as that prescribed by the laws in force at the time of the commission of such act, of such State or Territory, for such acts; and if said laws prescribe no punishment therefor, then said act shall be punishable in said pro-

¹⁰ Reports of Am. Bar Association, Vols. XIV. 59; XV. 395, 47; XVI. 17, 51, 323.

ceeding as at common law; and no subsequent repeal of any such State or Territorial law shall affect any prosecution for such offense in any Court of the United States.

"Section 3. The institution of such proceedings in a proper Court of the United States shall operate as a bar to any future proceedings of a criminal nature against the defendant therein in any State or Territorial Court."

A statute of such a character as this would appear fully within the legislative powers of the United States, and in the absence of a treaty, international obligations might justify provision for similar relief.

The Courts of the United States are thrown open to aliens in civil causes, by the express terms of the Constitution; but since in our system of judicial procedure, the civil remedy for an act is kept distinct from the public remedy, it is the more important that the latter should be promptly and efficiently applied.

The proposed law, in giving the national courts criminal jurisdiction in case of an injury to aliens of the kind in question, would secure an investigation of the affair before a jury not of the immediate vicinage, and not, therefore, likely to be actuated by neighborly feelings favorable to the accused, acting under the superintendence of a judge, not responsible to the State, and who, as he holds office for life, is in an independent position, as respects local or political influences. The court, also, being an arm of the government charged with the direction of all foreign relations, would be measurably within its control, and its disposition of the accusation might be confidently asserted by the department of State to be such as comported with justice and international right. The adoption of the local laws to define the offense and measure the penalty is in line with the general policy of the United States in administering judicial relief concerning matters originating in any particular State. U. S. Rev. Stat., Sections 721, 914, 5391, 5512, 5539. *In re Coy*, 127 U. S. 731, 752.

In his correspondence with the British Minister, as to the McLeod case, Mr. Webster referred to the probable event of the prosecution in language which he probably recalled afterwards with regret that he had not expressed himself with greater reserve.

"The indictment," he wrote, "is pending in a State court, but his rights, whatever they may be, are no less safe, it is to be

presumed, than if he were holden to answer in one of the courts of this government.

"He demands immunity from personal responsibility by virtue of the law of nations, and that law in civilized States is to be respected in all courts. None is either so high or so low as to escape from its authority in cases to which its rules and principles apply.

* * * * *

"It is understood that the indictment has been removed into the Supreme Court of the State by the proper proceeding for that purpose, and that it is now competent for McLeod, by the ordinary process of *habeas corpus*, to bring his case for hearing before that tribunal.

"The undersigned hardly needs to assure Mr. Fox that a tribunal so eminently distinguished for ability and learning as the Supreme Court of the State of New York may be safely relied upon for the just and impartial administration of the law in this as well as in other cases."¹¹

In the following year the passage of the new Federal *Habeas Corpus* Act having become assured, Mr. Webster was able to reply with better reason to a renewed complaint from Lord Ashburton, then the British minister at Washington, that "the Government of the United States holds itself not only fully responsible but fully competent to carry into practice every principle which it avows or acknowledges, and to fulfill every duty and obligation which it owes to foreign governments, their citizens or subjects."¹²

This pledge made by the executive department more than half a century ago, it may be fairly doubted if the legislative department has yet fully redeemed. No other position, however, than that taken by Mr. Webster comports either with the dignity of the United States, as one of the great powers of the world, or with their duties towards other nations, whose subjects are upon our soil, and claim the protection of our flag.

Simeon E. Baldwin.

¹¹ Webster's Diplomatic and Official Papers, 126.

¹² *Ibid.* 120; letter of August 6, 1842.

THE LEGAL PROFESSION IN SCOTLAND.

II. THE PRACTITIONERS.

The division of the legal profession in Scotland into barristers and solicitors is comparatively modern. The first lawyers of whom there is any trace in Scotland were the Imperial or apostolic Notaries admitted by the Emperor of the Holy Roman Empire or by the Pope. In the early middle ages we find them coming from the Continent to Scotland and employed in drawing up important deeds and protocols and acting as clerks to the Courts and in arbitrations. For long there appear to have been no native Notaries. The first notice we have of these is in the later middle ages, in 1469, when Parliament provided that Notaries were no longer to be made by the Emperor but were to be admitted by the King—the Bishops first examining and certifying them. For some time after this Clerical Notaries continued to act, and it is only after the institution of the Court of Session in 1537 that purely lay Notaries appear, that Court having assumed the power of admitting them. Soon after its foundation the Ecclesiastical Courts seem to have given up their power of admission, and the Civil Court to have become the sole authority. To this day the Court of Session continues to admit Notaries. A separate examination exists for them, and every solicitor also who chooses to apply is admitted. Their importance has much diminished. They do conveyancing work and are still required, according to the European common law, for certain formal acts, such as attesting the deeds of blind persons, protesting bills and making maritime protests.

The next legal practitioners of whom we have any notice were the Advocates. We know that they existed long before the foundation of the Court of Session, and that certain of them practiced both in the higher and lower courts. In the earlier times there were no solicitors and an Advocate was the representative of his client in Court, doing everything in connection with the case which was required. Each Court, Supreme or Inferior, at its discretion admitted its own Advocates. They were usually clerics and usually educated abroad. The word advocate, though now limited in common use to the counsel in

the Supreme Court, originally included every kind of procurator. A relic of the old use of the word advocate remains in Aberdeen in its use by the Society of Advocates there who are a body of law agents. The probability is that the name has been preserved there from Aberdeen having at one time been the seat of an important local Commissary Court.

From having originally been all Advocates the legal practitioners in Scotland have come to be divided into two distinct classes. The division was gradually introduced. The Advocates connected with the Supreme Court retained the most valuable of their privileges, the monopoly of appearing in that Court for clients, and side by side with them grew up various bodies of solicitors, who did the work connected with cases which could be done outside the Court, and who competed successfully with the Notaries for the bulk of the conveyancing work. The Faculty of Advocates of Scotland are the direct descendants of the Advocates who existed before the division of the profession: These Advocates, properly so called, are admitted by the Supreme Court, and have now right to plead in any Court in Scotland. They form an old corporation, the origin of which is lost in the middle ages. They are a numerous body—far more numerous than there is occupation for—and have been so for a long time past. From the late middle ages to this day they have been great encouragers of learning in Scotland, possessing one of the largest libraries in the United Kingdom, especially rich in manuscripts and in early printed books. The part they have played in the public life of Scotland has always been distinguished.

The oldest body of solicitors is the one known as the Clerks or Writers to the Signet. They were originally the clerks in the office of the Crown Signet, or lesser seal with which writs issued from the Court of Session were sealed. Some of these clerks came in time to be employed to draw these writs, and from this humble beginning has come one of the most dignified of the legal corporations of Scotland. Advocates not caring to quit the Court of Session, it was left to the Clerks to the Signet not only to draw the initial writs but to take, under counsel, the whole charge of the process. At first they were not recognized by the Court as having a regular position. Even so late as the seventeenth century the only persons whom the Court recognized as having charge of cases were the Advocates themselves.

The next body of solicitors in importance is the Society of Solicitors before the Supreme Court. Although now a large and

important body, their origin was of a similar character. The first of them were what were called the Advocates "First Clerks." To these, in the same way as to the Clerks to the Signet, the Advocates had been in the way of entrusting the management of cases so far as it could be done out of Court, and they came to be recognized as having the power to act for them in all such matters.

The third set of solicitors had their origin in the procurators in the Lower Courts, who originally could act in them only. Each County possessed at least one Society of them, and some of these Societies, like the Faculty of Procurators in Glasgow and the Society of Advocates in Aberdeen, were bodies of learning and influence. In the lower Courts the division of the profession was never carried out. If it had been it would, as in England, have extinguished them. The Advocates admitted by the Supreme Court were recognized apparently at a very early date as having the right to appear in all the lower Courts, but they rarely did so. The Procurators or Writers admitted by the Sheriffs were both counsel and agent in the Sheriffdoms where they were admitted, and out of them were not recognized. Matters continued in this unsatisfactory position until reformed by the Law Agents Act of 1873, passed by Lord Young when he was Lord Advocate. Under this Act all the solicitors acting in the Supreme Court got power to plead in the local Courts, and the solicitors in the local Courts power to act as agents in the Supreme—all being put upon the same footing. The power likewise of the local Courts to admit solicitors was taken away and the whole power vested in the Court of Session. Every solicitor admitted by the Court of Session has now equal privileges with the others, but the old corporations are still kept up. For the sake both of social position and of the libraries nearly every solicitor still joins one of them.

The way in which the work is practically divided between counsel and agents is readily enough understood. In the Court of Session counsel must be employed and they act only when instructed by an agent. So strict is this rule, that no counsel can even speak of the case to a client except in the agent's presence. After the agent has taken the instructions he communicates them to counsel, and it is the latter's duty when duly crammed to draft the written pleadings and to conduct all the oral proceedings in Court. In cases where evidence has to be taken, the agent ascertains who the witnesses are and what they have to say, and gives notes of this to the counsel, who examines them in Court. In the lower Courts the solicitors do the work both of

counsel and agent and are fully qualified to do so. In rare cases they may call in the help of counsel and when they do so the case is conducted in this respect in the same way as in the Court of Session. Counsel, however, have no right of free audience when employed in the Sheriff Court. As the volume of business begun in the Sheriff Courts is many times larger than that begun in the Court of Session, the experience which the solicitors in the lower Courts have of practicing on the American plan as both counsel and agent is very large.

Outside of Court work counsel do little in Scotland, except the giving of written opinions upon cases prepared by the Law Agents. They never draft deeds, though in important cases they sometimes may revise the deeds which the agents draw. In conveyancing work the solicitors have practically superseded the Notaries and, indeed, almost do the whole of it. Law agents in Scotland also do a good deal of work which in other countries falls to bankers and land agents.

The remuneration of counsel and agents is naturally very unequal, but never extends to the large incomes which are earned in England and elsewhere. A well-employed counsel may earn possibly twice as much as a Judge of the Supreme Court, and the successful law agents are sometimes said to earn even more. But these are very exceptional cases, and from them earnings taper down rapidly till in many cases they dwindle away to nothing.

Opinion is a good deal divided as to whether the division ought to be maintained. The strongest argument in its favor is that it has grown up of itself, apparently in order to satisfy a felt want. It has some advantages and many disadvantages. It has the effect of creating a class of men who are better adapted for work in Court and better qualified for filling judicial offices, but this again is got at the cost of a good deal of hardship. Many of the younger counsel are precluded from employment altogether, and the sphere of the agent is hardly so dignified as that held by the other branch of the profession. The seniors in both branches, who have made their position, naturally are against change, but amongst the juniors there are strong opinions for it. It can hardly be said that the public has an opinion on the subject. The public in Scotland as in England, take little interest in any legal matters and look upon the discussion on this point as something purely academic.

I have reserved to the last the saying of something concerning the education of the legal profession. Before the sixteenth

century Scotch lawyers were necessarily educated abroad. In the early middle ages they frequently went as far as Italy, and in the lists of students of the old Italian universities which have been preserved numerous Scotch names are found. When the French universities were founded Scotchmen thronged there and some few studied in Oxford. When the three old Scotch universities were founded about the middle and end of the fifteenth century, provision was made for founding law schools in them. At St. Andrew's and Glasgow, the law schools apparently took no hold, but at Aberdeen, probably in consequence of the existence of the Commissary Court already mentioned, the School of Law seems to have thriven, and it has existed from its foundation there in 1505 in unbroken succession to the present day. When that University was founded four chairs were established, two of these being legal, one of the Civil or Roman Law and the other of the Canon Law. At that time it was thought unnecessary to make provision for instructing in Scots Law. In 1505 the whole body of it was insignificant. In the long roll of professors there are many distinguished men, some afterwards Lords of Session. The Chair of Canon Law died out in the seventeenth century, and it is noteworthy that it was in 1640 that the first professor of law was appointed who had been educated in this county. The teaching till a much later time was simply that of the Roman Law and from the books preserved in the old library one may gather the nature of their studies. The folios of Azo, Bartolus, Gothofredus and Cujacius with hosts of the works of minor civilians stand there, now almost unread. After the seventeenth century the supply of works on Roman law seems to have fallen off, as if the interest in it had flagged. Probably the school then fell considerably in importance owing to the opening of law schools in Edinburgh and Glasgow. These schools were founded shortly after the Union between England and Scotland and took considerably larger dimensions than the school at Aberdeen. Notwithstanding, however, the foundation of these schools in Scotland, most of the Advocates continued to get their education abroad. In the later middle ages France had been the country they had chiefly frequented, many Scotchmen remaining there as teachers. After the Reformation it was the Low countries—Leyden, Utrecht and Groningen—which they chiefly frequented. This custom endured to the end of last century, when it fell gradually into general disuse. It cannot be said to be altogether abandoned yet. Now, however, when Scottish lawyers go abroad to study

it is usually to Germany where the most flourishing schools of Roman law are now found. The abandonment of Latin as the language of instruction was fatal to the frequentation of the Dutch law schools by pupils from other countries.

The Scotch law schools cannot be said to be well furnished. The best furnished is Edinburgh with seven teachers; the next is Glasgow, with five, and then comes Aberdeen, with three. The teaching is not supplemented to any considerable extent by teaching outside of the universities—the only place where that is attempted being Glasgow, where a somewhat ambitious attempt has been made. In St. Mungo's College there—which is a private school not entitled to grant degrees—there are some twelve teachers, and they furnish a better programme than any of the universities.

The universities alone grant degrees in law. Whether they had ever done so in old times after examinations, is not clear, but if they did, the practice had fallen entirely into disuse, and was not revived till 1860. The degree of LL.D. is still merely an honorary degree, but the universities now grant the degrees of LL.B., and B.L. The former is granted in Edinburgh and Glasgow, and the latter, in these two universities and also in Aberdeen. The former degree requires a curriculum of three years and to pass in seven subjects; the latter a curriculum of two years and to pass in four subjects.

Except for the bar, attendance at a university is not compulsory. Advocates have to attend a limited number of law classes, but if they choose to attend the university and to take degrees there, they save themselves a considerable amount of trouble. In general knowledge, a person passing for the bar must either take the university degree of Master of Arts¹ or pass an equivalent examination. In law, if he choose to take the degree of LL.B., he gets through his examinations as a matter of course.

The education of the solicitors is seriously hampered by the necessity they are under of serving a long apprenticeship. In the ordinary case a solicitor has to serve an apprenticeship of five years, but if he is an M.A., it is limited to three years. In most cases there is reason to believe that the longer apprenticeship at all events, is spent in learning what would easily be learned in half the time. The result of it is to leave young solicitors with

¹ In Scotland the degree of B.A. is not granted. The Scottish M.A. degree is equal to the American and English B.A.

comparatively little time for the study of law. In general knowledge if a solicitor is not a Master of Arts he must at the beginning of his apprenticeship pass an examination which is practically equal to the matriculation examination of the universities. At the conclusion of his apprenticeship he is at liberty to go up for examination in law. It is not requisite that he should have attended any classes in a university. He requires to pass in three subjects—Scots Law, Conveyancing, and Forms of Process. If, however, he chooses, he may attend classes, and he usually does so. This law examination takes place before a body of eight examiners appointed by the Court of Sessions. Of these at present three are teachers of law and five are practicing law agents. If the candidate has taken a law degree—either that of LL.B. or B.L. at a Scotch university, he is excused from further examination except in process. The B.L. degree was specially instituted for his advantage.

What is most wanted in Scotland in legal education is, firstly, a higher standard for general knowledge, and, secondly, a higher standard for law; but as long as the present apprenticeships are kept at their great length, it seems impossible to expect that young men can find the time necessary for study. If five years of a young man's life is to be taken up in doing work, most of which could be done by a typewriter, it is impossible that he can give time either to general or legal education. Probably it is too much to expect that Scotland will follow the example of America and abolish apprenticeships, almost entirely, but certainly a very considerable reduction in their length would be a practical reform of great advantage. Unless the period for study can be extended, nothing except an increase of cram can be expected from raising the standard of examination. Greater development of the schools is wanted, but at present there is no room for it. The annual number of students who enter for training for the bar is not more than from a dozen to a score. The bulk of the students at all the three Scottish schools are training for solicitors and they have hardly time even for the present classes. If they could devote more time to the law school, subjects could be divided and added to, till a really good curriculum could be supplied.

I trust these notes on the legal profession in Scotland may interest some in America. The comparison of systems is always profitable. In comparing systems, we can always find something to admire, something to criticize and much whereof to think.

J. Dove Wilson.

THE CONSEQUENCES OF CUBAN BELLIGERENCY.

Some weeks since there appeared in a leading New York paper this statement: "Señor Palma, now delegate of the Cuban Revolutionary party in the United States, will be the accredited minister of the new republic at Washington, if President Cleveland acknowledges the belligerency of Cuba." It is hardly probable that any members of the Law School would be deceived by so palpable a blunder as this. The recognition of belligerency, when accorded to a people trying to fight their way up to statehood, carries with it no right of diplomatic intercourse. If it did, it would be barely distinguishable from a recognition of independence. But there are various consequences—positive and negative—which *do* flow from the recognized belligerent status, which may not be so clear, and I have thought it might be of interest to the readers of this JOURNAL to see them briefly set forth.

Not that a recognition of the Cuban belligerents is at once necessary, or proper. That is not a matter to be decided by sentiment. If one State takes the part of an insurgent body in another, through sympathy with its wrongs, and desires to aid it, that is intervention, not recognition. The recognition of Cuban belligerency should be governed by the interests of this country which are involved; by the ascertained existence of a civil and military organization, responsible for its acts and conforming to the rules of war; and by the gravity and character of the contest. Or, to put it more specifically, if the United States finds its trade considerably affected by the acts of war of a new *de facto* State, possessing a definite territory where the old sovereign no longer controls, it recognizes that new body as a belligerent, and holds him responsible for his conduct for its own sake.

In regard to these essential facts in Cuba it is rather difficult to find out the truth. Until the Cubans possess some of the ports of the island and carry on war by sea, our shipping interests cannot be much involved. On the other hand, there must be losses of sugar and tobacco property in the interior belonging

to Americans, the responsibility for which will need determination.

However, it is not the expediency of a recognition of Cuban belligerency, but the legal consequences flowing from such recognition that I would here discuss. Perhaps a consideration of the latter will aid in deciding the former. As between the parent State and the insurgent body, the relations are not changed by an outside recognition of the latter's belligerency. In theory the insurgents may be considered traitors and be dealt with in accordance with municipal law. But in point of fact, the executive branch of the State will probably accord them the rights of belligerents, being guided first by the dictates of humanity, and second by the danger of retaliation.¹

But as between the insurgent body and other powers, a new relation is introduced, that of neutrality. The revolutionary flag will be recognized, so that ships bearing it, in spite of the lack of ordinary clearance papers, will be received at foreign ports as having a definite standing. Thus, early in our Civil War, the *Sumter* put in at Curaçao, Holland having recognized the belligerency of the Confederacy. The commission of the *Sumter's* captain was accepted as granted by a lawful belligerent and the ship admitted on the same footing with ships of the North, though Mr. Seward tried to fasten a piratical character upon her. A better standing will be gained for the borrowing of money—an act which is based upon future expectations—because the recognition is a stamp of success up to a certain point, and therefore encourages those expectations.

The insurgent men-of-war will be entitled to the same hospitalities as well as limited by the same restrictions in neutral ports as the ships of the parent State, except so far as these may be modified by previous treaty. For not having acquired statehood and the right of negotiation, the revolutionary body can have made no treaties. Neutrality thus becomes a real and practical thing, and its machinery—neutrality laws, foreign enlistment acts, or whatever other name such regulations may bear—is put into operation. If a "recognized" insurgent blockades a port after due notification, the neutral submits to such blockade. It admits his right to search for and seize contraband articles belonging to its subjects and destined for his enemy's use, on the high seas. The insurgent thus gains considerably from recognition of his belligerency. He gains in *caste*; he gains in

¹ Case of the *Amy Warwick*, 2 Black. 635.

rights; he gains in the facilities for carrying on war. But his enemy, the parent State, gains as well and as much, also with reference to third parties.

A state of war is declared to exist. As a lawful belligerent it may blockade and search and capture for carrying contraband, and exercise all the rights of war and insist upon all the neutral duties, which during an unrecognized insurrection would not come into being.

Thus during the Civil War of 1861-65, the blockade of the Southern ports, a powerful and unmatched weapon in the hands of the North, was a belligerent right, its observance a neutral duty, which foreign recognition of Southern belligerency made possible. For blockade is a war right solely. When President Lincoln laid the blockade he virtually recognized the belligerency of the Confederate States himself. During war, too, the neutral State is responsible for the conduct of its subjects; it is held to a stricter and more exact accountability than it can be as a mere friend regarding the internal disorders of a fellow State, with very possible complacency.

There is another and most valuable consequence of the recognition of belligerency which the parent State enjoys, it is no longer responsible for the acts of the insurgents. They may injure the person or destroy the property of neutral subjects by land or by sea, and their *de facto* government is alone responsible. This is a tremendous weight off the shoulders of the existing State; if the insurgent body dissolves, its responsibility for such damage vanishes. The neutral who is injured it is that suffers without redress.

Yet that neutral has a certain interest as well as the other two bodies, in the results of this recognition. A state of war is declared to exist between two friendly belligerent bodies. For such a state of things its neutrality laws provide. Its citizens can be told just what they can deal in without seizure as contraband. Certain seaports are either open, or closed by blockade. It knows just what its duties are. The air is cleared. A State jealously watching over the welfare of its subjects and their commerce, desires most of all to know exactly the conditions which apply to them. And it may have a certain sympathy for a struggling, perhaps a long suffering community, which finds expression in this way.

There are thus three sets of interests which are affected and altered by recognition of belligerency, those of the insurgent as regards neutrals, of the parent State as regards neutrals, and of

the neutrals as affected by a state of war. Let us try to apply these principles to the case of Cuba. The insurgents would have a better chance of selling bonds, a flag recognized by other States, and war rights against neutral commerce.

Spain would hold the United States government to a stricter accountability in the prevention of filibustering expeditions and the detention of ships capable of being used for war. For all such breaches of neutrality, the United States would be responsible in damages unless it could prove that it had exercised reasonable care and diligence. Its municipal statutes would no longer be the measure of its duties in this regard.

Spain also would possess the rights of a belligerent against United States commerce, which is not the case at present. Thus if the Cubans succeeded in capturing some or all of the seaport towns of the island, Spain having control of the sea with her navy, could and probably would shut out all neutral trade from them, through blockade. She would have the right of capturing all war material shipped from this country to Cuba for the use of the insurgents, whatever the ownership, even on the high seas. In enforcing these rights her gunboats could stop, visit and search any commercial vessel of the United States. The *Alli-ança* incident would often be repeated, but on the high seas, while remonstrance or resistance would be unlawful.

Again, Spain would be relieved of responsibility for all damage done by the insurgents to the property of neutral subjects in Cuba, while at present in such case, it is probable that she could be held liable.

The United States in turn, confronted by a war between two lawful belligerents, must duly respect their war rights. Its merchantmen must keep away from blockaded ports, must submit to exasperating search, can carry on trade in contraband only under penalty of the loss of the goods and often of the ships as well, if caught in the act. Its citizens owning property in Cuba would find it indistinguishable from belligerent property and subject to all the casualties of war. Its citizens who evaded our laws and sought service in the revolutionary army would lose their right of protection and must expect the same treatment that the insurgents met with. And its trade with the island in certain contingencies, would be entirely cut off, so that the interchange of breadstuffs and manufactures for sugar and tobacco would be as dead as the cotton trade between England and the South during our Civil War, kept alive only by a few cargoes which ran successfully the risks of blockade. The treaty

made with Spain one hundred and one years ago, except those articles which are obsolete, has also a bearing on our subject, for its specific provisions must be added to the general rules of International Law. Thus the list of articles which shall be considered contraband is there laid down, and Article XIV. forbids the subjects of either State to accept letters of marque from an enemy of the other, under penalty of being punished as pirates. So that no United States citizen could fit out a privateer in the Cuban interest. He would be violating treaty obligation and our own statutes as well.

Bearing these legal consequences in mind, it is probable that our recognition of Cuban belligerency would help Spain first and most, the Cuban cause secondarily, and would be decidedly injurious to the interests of the United States. Recognizing this, one of the profound jurists in the Senate advocates a recognition of independence rather than of belligerency. That of course would be a recognition of a fact which is non-existent, and must be avowedly a war measure aimed at Spain. France did this in 1778, by way of expressing her hostility to England, and war with England resulted as a matter of course. What the senator's cause of war with Spain is, he does not divulge. It is a source of wonder that no one has yet invoked the Monroe Doctrine in the matter.

Thus it would seem to be for the interest of the United States to let the present status in Cuba continue, rather than to recognize the insurgents' belligerency, an act which would be quite at variance with our own precedents. If recognition should be determined upon, however, Spain, though she might feel aggrieved, would not really be injured; she would not be put in a relatively worse position for coercing Cuba. But to couple with this recognition, a request to Spain to grant the independence of Cuba, is a slap in the face.

T. S. Woolsey.

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THE popular loan has been the great event of the month past, overshadowing a revolution in Cuba, and even Lord Dunraven's farewell. Unquestionably its striking success surprised even the best financial judges, some of the shrewdest of their number having bid considerably beneath the requisite purchase price. At the time of the preliminary negotiations the majority of our financial leaders were in favor of a repetition of last year's scheme of purchasing gold by an issue of bonds to a bankers' syndicate under a contract on the part of the latter to bring the gold to the Treasury from beyond the seas. But these disbelievers in a popular loan proved to be false prophets. The recent loan, by its immediate success, amounts to an emphatic vote of confidence in our national credit on the part of our holders of wealth such as no syndicate deal could have possibly denoted. Subsequent movements of the market have shown how strong has been the favorable reaction. England herself is recovering confidence in our soundness and the rates of exchange have quietly dropped to a very comfortable figure. More than this, now that the gold for these bonds has been actually paid in, we know that the purchasers have lived up to the spirit and not the mere letter of their contract of purchase, and but little gold has been withdrawn to be immediately returned for the purpose of payment. We have thus gained a breathing spell after the financial whirlwind, and even the voice of the silverite for the moment does not rise much above a whisper. Still the money situation is not

clear for any distance ahead. It never will be thoroughly clear until we get on a hard gold basis, and the Government retires from the banking business. But at present the threatening clouds on the financial horizon are the two great party conventions. No prophet can tell what these days will bring forth on the currency question, but there is a good chance that each party will play fast and loose with this most important of all issues. If this is the result, there will be a strong move among our long suffering financial interests to revolt and form a third party with a ringing gold platform. Of course this is still in the clouds. But it is a possibility which the chief engineers of each party cannot afford to ignore in their plans for the coming campaign.

* * *

A LARGE part of what is wrong in our political life is due to lack of special training upon the part of those who conduct the affairs of state. Much that is attributed to dishonesty and corrupt motives is rightly chargeable to ignorance. The people of this country entrust their most vital interests to men who would in most cases serve them well if they could, but who simply cannot do it; not for lack of natural ability, of which the modern office-holder has considerable, but for the want of special training which the peculiar character of the work requires. The government of a nation which claims to lead in civilization as the great exemplar of democracy, is not so easy a matter as, judging from the qualifications of the representative, the constituent thinks it to be. The test is applied to the ability to attain office, more than to conduct in office. It is thought by many who are desirous of improving the condition of affairs that the remedy lies in choosing business men of high character to fill public office, instead of those who make a business of politics. This is an erroneous conclusion, we think. It is the character of the training of the man who to-day makes politics a business, which disqualifies him for good service, and not the fact that he devotes himself exclusively to it. A knowledge of the conditions of business is, of course, essential to the legislator, and doubtless actual commercial experience is highly valuable in acquiring such a knowledge, but this alone is not enough. It is, however, all that the man who goes from mercantile life into politics ordinarily brings with him. Naturally a person actively and successfully engaged in commerce, becomes so engrossed in the problems of business, as not to give much time and careful consideration to the other questions with which the publicist has to do. The gov-

ernment of men is a science. It has a history, a philosophy of its own. Politics is a profession, with professors, practitioners and students like any other. It is none the less so because the practitioners are below the professorial standard. This profession is of its nature closely allied to that of the law. The practicing lawyer would probably better serve his clients if he abstained from the practice of politics, although he can never be a great lawyer without a knowledge of political science, but the legislator cannot serve his clients well if he neglects the law. The broader science includes the narrower. A knowledge of law and political science can undoubtedly be obtained outside of the schools by the private study of treatises and otherwise. The university is, however, the place where a fundamental knowledge of these sciences as of all others can be best obtained. We believe that at no other great center of learning in this country are opportunities offered for special preparation for a public career, equal to those which the Law Department of Yale University, in its graduate courses, presents to the student who has completed an undergraduate course in law and whose preliminary education justifies his entering professional life at all. The work leading to the degrees of Master of Laws and Doctor of Civil Law includes in addition to the advanced study of American Law, courses in the Civil Law, English Constitutional Law, Political and Social Science, Railway Management and Economics of Transportation, General Jurisprudence, Comparative Jurisprudence, American Diplomatic History, and others, with professors of the highest reputation in their respective departments. Such opportunities should not be overlooked by those who are qualified to embrace them and who are now preparing for graduation. The training will be of inestimable value to the practicing lawyer—to the lesser number who may later enter political life it is essential to real success. That it may be obtained here in fuller measure and of better quality than elsewhere is a fact worthy of consideration.

* * *

THE JOURNAL notes with pleasure the recent establishment of a branch of the Civil Service Reform League at Yale and trusts that it may become as popular as its object is patriotic. For nearly forty years after constitutional government began in the United States, it was the rule under all administrations not to remove from office except for just cause. The purity and dignity of the politicians and politics of that period as contrasted with

the corruption and abuses which have arisen since Marcy declared the doctrine, "To the victors belong the spoils," affords a most striking proof of the necessity of reform in the Civil Service. Under the spoils system every political vice pervaded each department of our government. Independent action of both executive and legislative branches was destroyed and even the judiciary did not escape suspicion. As a result an army of incompetent supernumeraries was forced into our public service to feed and fatten upon the public treasury. This abuse continued in full sway until President Grant, in 1872, initiated a system of competitive examinations for service in certain departments of the government. But members of Congress, foreseeing a loss of patronage, opposed the president's action and defeated the appropriation for a commission which had been recommended by him. Ten years later Congress was forced by popular demand to pass the Pendleton Bill, which was a long step toward the reform. The application of the law has not been too rapid, but to-day there are more than 56,000 government positions held by virtue of the merit system. The movement is opposed only by the small type of politicians who still chafe under this law and mourn the loss of their departed greatness. The party "boss" hates the reform as the devil hates holy water, because it destroys his power; the corrupt politician hates it because he can no longer levy his assessment on the faithful public servant or control his vote by threats of removal. But the patriotic and intelligent citizen, and the far-sighted statesman, and every political party fit to be trusted with power, recognize in the progress and ultimate triumph of the principles of Civil Service Reform, the strongest safeguard for the stability and security of our government.

COMMENT.

We call attention to the decision of two cases which arose under Section 3893 of the Revised Statutes which provides that "every obscene, lewd, or lascivious book, pamphlet, picture, paper, etc., * * * are hereby declared to be non-mailable matter, * * * and any person who shall knowingly deposit * * * for mailing or delivery, anything declared by this section to be non-mailable matter * * * shall for each and every offence be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the Court."

The first of these cases, *Lew Rosen*, plaintiff in error, v. *The United States*, was decided in the Supreme Court of the United States, the opinion being rendered by Mr. Justice Harlan. The facts were substantially as follows: Lew Rosen was the proprietor of a paper called *Broadway*, published in New York, and in response to a decoy letter mailed a copy of his paper to one George Edwards, living in New Jersey. Rosen was then indicted for violating the above quoted section of the Revised Statutes and was found guilty, and after motions for a new trial and in arrest of judgment had been denied, was sentenced "to imprisonment at hard labor during the period of thirteen months." He thereupon brought the case before the Supreme Court for review. Although no new point of law is decided by this case, still the power of the Federal Government to protect its mails from obscene matter is clearly shown and at the same time to render the publication of such periodicals impossible. We are indebted to the Chicago *Legal News* of February 29, for a report of the opinion in this case. For a report of the second case we are indebted to the San Francisco *Argonaut* of February 24. It appears that one Joseph R. Dunlop was the publisher of a newspaper in Chicago called *The Daily Dispatch*. The *Argonaut* comments that "It does not appear that Dunlop was doing any thing startlingly exceptional, anything which the readers of newspapers in New York, San Francisco, or any other large city are not familiar. He merely printed obscene matter." The Society for the Prevention of Vice expostulated with him but no attention was paid to their efforts. Then the Federal Grand

Jury indicted him for sending obscene matter through the mails, and upon trial he was convicted and sentenced to two years' imprisonment and a fine of two thousand dollars was imposed.

In passing sentence Judge Grosscup said: "These newspapers are indecent and obscene. They were not simply insufferable to good taste and good morals, they were clearly and vilely criminal. As Lord Chatham said, 'a man's house is his castle, the storm may enter, the rain may enter, but the King of England may never enter.' Every family may create its own standard of morals, its own atmosphere of taste and purity. The door can be shut against offensive servants, offensive visitors, and offensive literature, but the hand of the mail service penetrates every chamber of the household. It is no light obligation to see that that hand is always clean." It is to be hoped that the decision of these two cases will go far toward the cleansing of "our great dailies" and the suppression of those weeklies, which have sprung up with such alarming rapidity within the past few months in most of the large cities, the apparent intention of which seems to be to sail as close to the border line of absolute indecency as possible.

It is encouraging to know that legal common sense has at last found a clear way out of the inextricable confusion in which the Northern Pacific Railroad has been involved for the last three years. The situation has been certainly the worst of a large class of striking examples which our railway systems have been displaying of late. The remedy discovered is unique in our judicial experience and is as simple as the situation was complicated. But it was attained only because the various factions had fought out their struggle until they reached a state of complete deadlock. The immediate difficulty grew out of the conflict of jurisdiction between the Federal Courts whose circuits embrace the property of the system. True, the situation was bad enough before this complication arose. With the property in the hands of receivers for nearly three years, with five diverse factions fighting tooth and nail, with one leading interest controlling the officers, and another the receivers, and the former charging the latter with the worst forms of fraudulent management, it would certainly look as if the confusion were sufficiently hopeless. But this was plain sailing compared with what resulted when the various circuit courts began to fight for the control over the property.

Four circuits have partial jurisdiction over the big railroad system. The original receivers were appointed by Judge Jenkins of the seventh circuit which includes Wisconsin. Charges of mismanagement were brought against these officers by the Ives party, they were compelled to defend themselves in three different districts, and finally found themselves in the impossible position of operating a railroad under the conflicting orders of about four different masters. This was too much for human ingenuity, the receivers resigned, and the trouble thickened. Judge Jenkins promptly filled their places; but Judge Hanford in the Washington district (ninth circuit) refused to recognize these receivers, and promptly appointed his own nominee. The judges of the eighth circuit stood by Judge Jenkins, while Judge Lacombe of the second (New York) circuit, compelled the original receivers to retain their places until the Western judges on the scene of action could agree. Unfortunately this was exactly what these judges refused to do. Finally after some months of this state of total blockade the various fighting factions decided to take the matter into their own hands, and by an original move brought the whole trouble for advice before the four justices of the Supreme Court who are assigned to the different circuits. These judges have promptly solved the difficulty. On January 28th they issued an advisory order that Judge Jenkins' circuit (the seventh) shall have original jurisdiction over the whole system. By this simple move it is now possible to have a single set of receivers for the whole property, and the dissenting judges are thus compelled to yield by the warning of their superiors. As we have said this action has never been taken before, but it will doubtless prove a precedent for other cases of the same sort. In the present case it will mean the salvation of this much abused property.

The question of citizenship in the United States is receiving repeated attention in the Federal Courts. A recent case, *In re Wong Kim Ark*, 71 Fed. 382, illustrates the incompatibility between the common law rule as to citizenship and the doctrine affirmed by the law of nations.

In this case, a person born of Chinese parents domiciled in the United States, but subjects of the Emperor of China, departed upon a temporary visit to China and subsequently returned; and thereafter, in 1894, he again departed for China, and returning in the following year was refused by the collector of customs permission to land. In rendering his decision upon *habeas*

corpus, Judge Morrow interpreted the phrase "subject to the jurisdiction thereof," occurring in the fourteenth amendment to the Constitution of the United States, to mean "subject to the laws of the United States," comprehending in this expression "the allegiance that aliens owe to a foreign country to obey its laws." *In re Look Tin Sing*, 21 Fed. 905, was followed as establishing the common law rule. Mr. Justice Field there held: "They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the subsequent obligation to obey them when obedience can be rendered; and only those thus subject by their birth or naturalization are within the terms of the amendment." Similar opinions were expressed in *Lynch v. Clark*, 1 Sandf. Ch. 583; *Gee Fook Sing v. U. S.* 49 Fed. 46; 7 U. S. App. 27. *In re Chin King*, 35 Fed. 354; and *In re Young Sing Hee*, 36 Fed. 437.

In favor of the rule of the law of nations, however, are text-writers of high authority, relying upon certain dicta of the United States Supreme Court, although this precise question has never received final adjudication by that tribunal. Judge Cooley (Const. Law, 254) says: "But a citizen by birth must not only be born within the United States, but he must also be subject to the jurisdiction thereof; and by this is meant that full and complete jurisdiction to which citizens generally are subject, and not any qualified and partial jurisdiction such as may consist with allegiance to some other government." A dictum of Mr. Justice Miller, in the so-called Slaughterhouse cases, 16 Wall. 36, would seem to support this view. He says: "The phrase, 'subject to the jurisdiction,' was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign states born within the United States." *Elk v. Wilkins*, 112 U. S. 94, seems also to sustain the same view.

A decision by the United States Supreme Court is needed to determine conclusively the true American doctrine upon this interesting point; for Judge Morrow, in rendering the decision in this present case, used the significant words: "The doctrine of the law of nations, that the child follows the nationality of the parents and that citizenship does not depend upon mere accidental place of birth, is undoubtedly more logical, reasonable and satisfactory; but this consideration will not justify this Court in declaring it to be the law against controlling judicial authority."

RECENT CASES.

INJUNCTIONS.

Injunction.—Belknap et al. v. Schield, 16 Supreme Court Rep. 443. An injunction cannot issue to restrain United States officers from using an article made by them in infringement of patent, when such article is in the possession of and used for the benefit of the United States.

Injunction—Action on Bond—Damages—Interest.—Belmont Mining & Milling Co. et al. v. Costigan et al., 42 Pac. Rep. 650 (Col.). When the sale of land under a trust deed is delayed by a temporary injunction, and upon subsequent sale it fails to bring enough to pay the secured debt, an element of damage is the difference between the amount actually received and what would have been probably realized if the injunction had not been granted, but interest upon the amount of the debt during the time of the delay should not be awarded.

Injunction—Damages—Attorney Fees.—Creek v. McManus et al., 43 Pac. Rep. 497 (Mont.) This was a suit for damages on an injunction bond, in which the plaintiff sought to recover, as one item of damages, fees paid to an attorney who resisted the injunction and tried the case on its merits. But the court held that, since the attorney was employed generally, fees could not be recovered as damages.

INSURANCE.

Action on Life Insurance Policy—Evidence—Appeal—Harmless Error—Estoppel.—Mullen v. Mutual Life Insurance Co., 32 S. W. Rep. 911 (Tex.). Where, as required by law, a notice is sent to plaintiff and his wife on whose lives a life policy has been issued, stating the premiums due and that the policy would be forfeited for non-payment, the plaintiff cannot avail himself of his failure to deliver the notice to his wife and claim that the policy was not forfeited because she had not received notice.

Construction of Policy—Conflict of Policy and Application—Revival of Policy—"Renewable Term" Policies.—*Goodwin v. Provident Savings Life Assurance Society of New York*, 66 N. W. Rep. 157. Equivocal terms of a life insurance policy will be construed in support of the claim for indemnity. When the provisions of the policy conflict with the stipulations of the application, those of the latter yield to those of the former. When a New York "renewable term" policy is forfeited through non-payment of premiums, a reinstatement has not the effect of making a new contract but of canceling the forfeiture.

Insurance—Assignment of Life Policy—Assignee may Enforce.—*Steinbach v. Diepenbrock et al.*, 37 N. Y. Sup. 279. An insurance policy taken by a person upon his own life can be assigned like any chose in action, and upon the death of the assured the assignee is entitled to the full amount payable, even though he has no insurable interest in the life of the assured.

Insurance—Conditions—Waiver.—*Gross v. Agricultural Ins. Co. of Watertown*, 65 N. W. Rep. 1036 (Wis.). The action was brought to recover on a policy containing a provision that if the building insured be on ground not owned by the insured in fee simple, the policy should be void, unless a written waiver to such condition be attached thereto. At the time the policy was issued the defendant's agent knew that the plaintiff had only an estate for years and waived the condition avoiding the policy on this ground, but neglected to attach the waiver to the policy. Held: This waiver was effective.

Insurance—Conditions of Policy—Breach—Estoppel to Claim Forfeiture—Knowledge of Agent—Powers of Agents.—*Dick et al. v. Equitable Fire and Marine Insurance Co. et al.*, 65 N. W. Rep. 742 (Wis.). An insurance company waives the forfeiture resulting from a breach of a condition of the policy when it requires the assured at some expense and trouble to give a carpenter's estimate of the damage.

Insurance—Policy—Provisions as to Health.—*Robinson v. Metropolitan Life Ins. Co.*, 37 N. Y. Sup. 146. A provision in the policy that the insurer assumes no obligation unless the insured is in "sound health" refers to the physical condition, and the fact that the insured is a cripple and an idiot, but in other respects enjoys good physical health, does not avoid the policy.

Insurance—Stock in Illegal Business—Invalidity of Contract Policy.—Sun Mutual Insurance Co. v. Searles et al., 18 Southern Rep. 544 (Miss.). The Searles Co., merchants, had paid their proper privilege tax, but subsequently permitted their stock to exceed their license limit. The court held that their business became *eo instanti* illegal, and that in consequence a contract of insurance thereafter issued upon said stock is invalid.

Life Insurance Policy—Construction—Stipulation against Suicide—Validity.—Mutual Reserve Fund Life Ass'n v. Payne, 32 S. W. Rep. 1063 (Tex.). The lawful stipulation by a life insurance company against liability for death of insured by his own hand, whether sane or insane, may be overcome by a clause in the certificate, providing that after being in force five years, the certificate should "be incontestable for any cause except the non-payment of dues."

Life Policy—Who entitled to Proceeds.—Geoffrey v. Gilbert et al., 36 N. Y. Sup. 884. In this case a father took out a life insurance policy payable to his four-year-old daughter or "her legal representatives." Twenty-two years later she married and soon after died. Subsequently her father died; and it was held that her surviving husband could not receive the benefit of the policy *jure mariti*, for his wife's interest had terminated; nor as legal representative, for they take by substitution, and the substituted beneficiaries are the next of kin.

MISCELLANEOUS.

Bank Officer—Liability for Deposit—Bill of Particulars—When Ordered.—Townsend v. Williams, 23 S. E. Rep. (Jan.) 461. The plaintiff having placed money in a bank of which the defendant was vice-president, heard rumors questioning the solvency of the concern, and attempted to withdraw his deposits. The defendant assured him that the bank was safe, saying "We have got all the money you want. You never need have any fear of this bank as long as I am in it," knowing at the time that his statement was false. The plaintiff, relying on said representations, lost his money on the failure of the bank. Court held that defendant was personally liable.

Chinamen—Right of Naturalization—Effect of Passport—In re Gee Hop, 71 Fed. 274. Gee Hop was naturalized as a citizen of the United States in Camden, New Jersey, and thereafter he

obtained from the State Department at Washington, passports as a citizen of the United States, and armed therewith he departed for China, and returning subsequently was refused permission to land. On *habeas corpus* it was held, that the naturalization of Gee Hop by the court of New Jersey was absolutely null and void, and that passports reciting the fact of his citizenship were not conclusive proof of the facts therein contained.

Constitutional Law—Jury Trial—Unanimity of Verdict.—*Pratt v. Parsons*, 43 Pac. Rep. 620 (Utah). The legislature of a State may pass a law to the effect that in civil actions a verdict may be rendered by a concurrence of nine or more jurors, and such law will not be in conflict with the clause of the constitution which provides that in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved.

Executor—Purchase from Legatee—State ex rel Jones v. Jones et al., 33 S. W. Rep. 23 (Mo.). An executor may purchase from a legatee his interest in the estate, but the burden of proving absence of fraud rests upon him, because of the trust relation.

Garnishment of City Funds—Execution.—*Murphree v. City of Mobile et al.*, 18 Sou. Rep. 740 (Ala.). A plot of land owned by a city and not shown to have been used for municipal purposes may be sold under execution against the city. Money derived from the sale of such land is subject to garnishment when deposited in a bank which by statute is only a depository for such funds as are collected for taxes, licenses, fines, penalties and forfeitures.

Municipal Corporations—Injury to Firemen—Assumed Risk.—*Farley v. Mayor, etc., of City of New York*, 36 New York Supplement, 1115. The plaintiff, a hose-cart driver in the fire department, was injured by the collision of the hose-cart with a truck which had been left standing in a dark street. It was held that as he was driving at a speed of more than five miles an hour contrary to a city ordinance, and in entering the service he had assumed the extra risk, he could not recover from the city; especially as he had accepted the pension provided by the city for firemen injured in the course of their employment.

Municipal Corporations—Rights in Streets—Grants to Railroad Companies—Freight Houses—Right of Way.—*City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 65 N. W. Rep. 649 (Minn.) The

City of St. Paul gave the defendant the right to construct a freight house on a public levee, basing the grant on the city charter, which provided that the city council shall have power to grant the right of way over public streets. It was held invalid on the ground that the city authorities may agree with a railroad company to use its streets or levees for tracks but not for freight houses.

Negotiable Paper—Bank Check—Liability of Bank.—Cincinnati H. & D. Ry. Co. v. Metropolitan National Bank, 42 N. E. Rep. 700 (Ohio). The giving of a check is not the assignment of so much of the creditor's claim on the bank, and the holder of the check, unless it has been accepted, cannot maintain an action against a bank for refusal to pay it, although the drawer has to his credit on the books of the bank a sum more than sufficient to meet the check.

Slander—What Constitutes—Dishonor of a Check.—Svendsen v. State Bank of Duluth, 65 N. W. Rep., 1086 (Minn.) The refusal of a bank to pay the check of a depositor, who is a merchant or trader, when it has sufficient funds of the maker in its hands to pay the same, amounts to a slander and the depositor is entitled to recover general compensatory damages against the bank.

Surety—Discharge of Mortgage—Estoppel.—Parke & Lacy Co. v. White River Lumber Co. et al., 43 Pac. Rep. 202 (Cal.) The discharge of a mortgage given by a surety to secure a contract will not discharge a note given for the same purpose but not connected with the contract.

Torts—Injuring Plaintiff's Business—Liability of Master.—Graham v. St. Charles St. Ry. Co. et al., 18 So. Rep. 707 (La.) A railroad company is not liable for injuries to the business of a store-keeper caused by discriminations of its foreman against employees who trade at his store, for such conduct is in no sense within the scope of his employment.

Wills—Estate of Legatee—Promise to hold for another.—Trustees of Amherst College et al. v. Ritch et al., 36 N. Y. Supp. 576. This is the famous Fayerweather will case. Where a testator devises his residuary estate to his executors absolutely, but with the understanding that they shall distribute the same among certain beneficiaries named in the will, the residuary legatees acquire no personal interest in the residuum, but take it as trustees.

BOOK NOTICES.

The value of *Anson on Contracts* as a text book for the student of law is too well established to need comment at the present time, but the recent edition of this work by Professor Huffcut of Cornell University has rendered it a welcome addition to the library of the practitioner as a book of reference. The text is from the eighth English edition and contains the Married Woman's Property Act of 1893 and the Sale of Goods Act, and is edited with American notes. The object of this edition is to give "parallel references to select American authorities where the American law corresponds to the English law as stated in the text by the author, and to indicate clearly the points at which the American authorities either disagree with the English law, or are strongly divided among themselves." It certainly can be said that Prof. Huffcut has accomplished his object admirably, as the references have been selected with scholarly care and judgment and the notes are particularly clear and well timed. Also the very brevity of the text stating the rule of law in concise and vigorous language with reference to the leading English and American authorities will prove of greater assistance to the busy lawyer than the general discursive work on the subject.

This edition contains 441 pages admirably printed and bound with a table of the English and American cases. Published by Macmillan & Co., 66 Fifth Avenue, New York. 1895. \$3.00.

Negligence of Imposed Duties, Carriers of Freight. By Charles A. Ray, LL.D. Rochester, N. Y.: The Lawyers' Co-Operative Publishing Company. 1895.

Our chief criticism of this book is its title, which in common with the others of the series is unnecessarily involved and slightly confusing. The subject matter is for the most part excellent. Thoroughness is the principal characteristic. The author's research has been painstaking and careful, but he evidently is not familiar with the modern bill of lading or he never would have written Section 24 as he did. We do not see how a much more liberal contract from the carrier's point of view could be devised than the one there set forth. We are disappointed, too, in failing to find even a mention of the Uniform Bill of Lading adopted in April, 1890, and now used by a large proportion of the American railroads.

The subject of Official Classification is lucidly expounded.

This in connection with the chapters on rulings and jurisdiction of the Interstate Commerce Commission makes the book a valuable addition to every working library. We take it that almost every lawyer at some time has a case for or against a railroad. Therefore to the profession generally we unhesitatingly commend this book.

Elements of Damages. By Arthur G. Sedgwick, of the New York Bar. Pages XXI. 336. Price, sheep \$3.00. Little, Brown & Co., Boston, Mass.

We are glad to note the appearance of this book which is in more senses than one an addition to the Students' Series. The writer is the author of *Sedgwick on Damages*, but this book is in no wise intended as an abridgment of that work. It is a new and independent review of the subject of damages and an attempt to put the legal principles of that subject, as far as possible in the form of rules. The arrangement is specially adapted to the use of students. The text gives the reasons for, and explains, the rules which are written in italics and followed by numerous illustrations. The latter are well selected and so admirably put that though few words are used the case and the principle involved is clearly stated. The first part of the book deals with principles and rules affecting the measure and proof of damages, while the latter part discusses the rules governing in particular cases. The chapters on Carriers of Passengers and Breaches of Telegraphic Contracts are specially good. In the former, a clear distinction between the liabilities of Carriers of Goods and Carriers of Persons avoids the confusion that often clouds this subject. The liabilities, too, of the Telegraph Company are distinguished from those of common carriers in general. The book is clear, concise and thorough.

The Principles of Equity and Equity Pleading. By Elias Merwin, late of the Boston Bar. Edited by H. C. Merwin, 658 pages. Sheep, \$6.00 net.

This valuable book represents the work of Mr. Elias Merwin at the Law School of Boston University, being a compilation, with some changes and the addition of notes, of the lectures there delivered by the author. The author treats in thirty-six chapters of the different subjects covered by equity. One entire chapter is devoted to the important subjects of subrogation and contribution, which are too often slighted in treatises on equity. The book contains copious references and foot-notes. The illustrations are drawn chiefly from the English courts, the Federal courts, and the Supreme Court of Massachusetts, although fre-

quent reference is made to the decisions of other State courts. We recommend the book both to students and practitioners.

Outlines of Legal History. By Archer M. White, of the Middle Temple, First Lecture Prizeman of the Inns of Court, London. Cloth, 250 pages. Price \$2.00. Macmillan & Co., New York.

This handy little volume in no wise pretends to be a complete history of English law, but it furnishes the English student, preparing for his final bar examination, a concise and clear outline of such a history. The book is similar to those of the Student's Series published in this country. The intent of the author has been to familiarize the English student with the courts by which the existing law is administered, with their origin and history. The present legal system is briefly described, giving the student a clear idea of the law of the day. The author then traces the development of that law through the old institutions which were important in developing it to its present form. The Saxon system, as the cradle of English law, is treated separately and the distinctions of the Norman system and the changes due to that system pointed out. The last chapter of the book is devoted to a summary of some leading legal principles. These topics are discussed chronologically which is of great advantage to the student.

Handbook on the Construction and Interpretation of Laws. By Henry Campbell Black, M.A. 1 volume, sheep, 438 pp. Price \$3.75 delivered. West Publishing Co., St. Paul, Minn. 1896.

This is the eleventh volume of the Hornbook series, and the second which has been contributed thereto by Mr. Black, who is so well known to the legal profession as the author of Black's Law Dictionary. It is a condensed statement of the rules which govern the construction of written laws, statutory and constitutional, and the cardinal principle which the author seeks to impress is that the interpretation should follow the intent of the legislator. This difference between strict and liberal construction he has aimed to reduce to a minimum. The case references are not over numerous, and many cases appear in the body of the text from courts and States whose authority on the construction of laws, however great locally, cannot be of much weight throughout the profession at large. The general principles are stated with clearness and conciseness, and the elaboration of them is as full as the size of the work admits of. The arrangement and typography are similar to the others of the same series that are familiar as text books to the students of this school.

MAGAZINE NOTICES.

The Albany Law Journal, 1896.

- Feb. 8.* Are Directors of Corporations held to a Sufficient
Accountability, Henry Wymans Jessup
Feb. 15. Civil Procedure in England, Elbridge L. Adams
Feb. 22. Preparation for the Bar, Richard L. Hand
Feb. 29. Report of the Committee on Law Reform of the
New York State Bar Association.
March 7. Some Peculiarities of the Law of Fire Insurance,
Myron H. Beach

Central Law Journal.

- Feb. 7.* Actions on Penal Statutes, Roscoe Pound
Feb. 21. Right of Way of Railroad Company, Watkins M. Vaughan
Feb. 28. Right of Members of Benefit Societies to Sick
and Distress Benefits, Eugene McMillin

Virginia Law Register, February, 1896.

- Trusts and Monopolies, Jackson Grey
Fellow Servants, Wm. O. Skelton

March.

- The Judges Tucker of the Supreme Court of Appeals of
Virginia, J. Randolph Tucker

The Yale Review, February, 1896.

- An Interoceanic Canal from the Standpoint of Self-interest,
Theodore S. Woolsey
The Vicissitudes of the English Socialists in 1895, Edward Porritt
The Early Political Organization of Mexico, Bernard Moses
Government Administration of Industrial Enterprise, A. T. Hadley
Labor in California, Carl C. Plehn
The Ethics of Copyright, Kate H. Claghorn

The Green Bag, March, 1896.

- William M. Evarts, A. Oakley Hall
The Extradition of Orton.
Legal Reminiscences, L. E. Chittenden
Some Notes on Quibbling, George H. Westley
The Anglo-German Controversy in the Transvaal.
The Supreme Court of Maine, Charles Hamlin
Lawyer's Easy Chair, Irving Browne

Michigan Law Journal, February, 1896.

- The Rights of the People in Criminal Cases, Judge Fred'k H. Aldrich
The Jury System—Objections to it, A. F. Brewer

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TAKING CORPORATE SHARES BY RIGHT OF EMINENT DOMAIN.

The last legislature of the State of Connecticut enacted a statute which by its terms enables any railroad company which shall be the owner of more than three-fourths of the stock of any steamboat, ferry, bridge, wharf or railroad company, to acquire by condemnation the shares of other stockholders. The statute is quoted in full in the margin.¹

¹ Public Acts, 1895. Chap. ccxxxii.

"Section 1. In case any railroad company acting under the authority of the laws of this state shall have acquired more than three-fourths of the capital stock of any steamboat company, ferry company, bridge company, wharf company, or railroad company, and cannot agree with the holders of outstanding stock for the purchase of the same, upon a finding by a judge of the superior court that such purchase will be for public interest, it may cause such outstanding stock to be appraised in the manner provided by section 3464 of the general statutes; and when said appraisement shall have been paid or deposited as provided in said section, the stockholder or stockholders whose share or shares shall have been so appraised shall cease to have any interest therein, and shall on demand made, surrender said stock and all certificates thereof to the corporation applying for such appraisal, and upon the deposit of said appraisal said certificates shall be deemed to be cancelled.

Section 2. "Any person holding a minority of the shares of stock in any company described in section one of this act may, if he cannot agree with the corporation owning three-fourths of such stock for the purchase of his shares, cause the same to be appraised in the manner provided by section one of this act; and an appraisement having been made and recorded in the office of the clerk of the superior court of any county where such railroad company operates a railroad, shall operate as a judgment against such company and in favor of the holder of such stock, and at the end of sixty days, unless such judgment is paid, execution may be issued.

(Section 3464 of general statutes provides for appraisal of land needed for railroad purposes.)

This statute is cited as a remarkable and extreme example of one method of effecting corporate consolidations. It is not known to the writer whether the aid of the courts has been asked to enforce its provisions, but it can readily be seen that in such case there might arise important questions. The statute suggests especially a consideration of the exercise of the right of eminent domain upon the interests of a shareholder in a corporation,—the conditions which lead to the exercise of the power, and the propriety of its exercise by the legislature.

The corporation, a legal entity distinct from its members, is the owner of all the corporate property and franchises. There always exists in the State a right to take such property and franchises for a public use, compensation for which having been paid to the corporation, the right of each shareholder in what has been so taken is completely extinguished, and there remains no necessity for any proceeding against the individual shareholder. Action against the corporation direct is always adopted unless it happens that holders of a majority of the stock are willing to transfer the corporate property without compelling the taker to proceed by condemnation. Practically, therefore, condemnation of corporate shares will never be attempted except as against a dissenting minority in cases where an extension of the corporate business or a consolidation is contemplated by the majority. It is clear that, if the majority had power to compel the retirement of a minority holder upon payment to him of the value of his shares, there would exist no occasion for a resort to taking of such shares by eminent domain. As will be seen, the majority have asserted such power in rare instances independently of the right of eminent domain, but the authority of those cases is doubtful.

I. *A shareholder cannot be compelled by the majority to join with them in a fundamental alteration of the corporate business, such as a consolidation.*³ This is familiar law, but it may be well to briefly state the reasons upon which it is based.

A corporation may exercise only those powers which are granted to it by the State. This limitation of its powers governs not only the relation of the corporation to the State, but also the relation of the corporation to its shareholders and of the shareholders to one another. Every holder of stock, whether acquired by subscription or by transfer, is a party to a contract by which he is bound to allow the common property to be man-

³ Thompson, *Comm. on law of Corporations*, Sec. 343; *Clearwater v. Meredith*, 1 Wall. 25; Morawetz, *Private Corporations*, 2d Ed., Secs. 395, 396; Beach, *Private Corporations*, Sec. 353.

aged, controlled and applied in the pursuit of the corporate purposes as expressed in the charter, by agents selected by the majority. He parts with the right to individually manage, possess and control such property except through the exercise of his voting power. But the power of the majority and of the corporate officers over the property of the shareholders is strictly limited to the purposes of the corporation as expressed in the charter.³ A fundamental departure from the original corporate undertaking is a wrong which the shareholder may resist and prevent.

But a shareholder may not hold his fellow members to the continuance of an unprofitable business. For just cause the majority may abandon the enterprise, dispose of the corporate property and distribute the net proceeds among the shareholders.⁴ In such case, however, it is the right of the shareholder to have the value of the corporate property ascertained by an *actual and bona fide sale*.⁵ Except as incidental to such an abandonment of the enterprise, a transfer of the corporate property and business to another person or corporation may not be made without the consent of every shareholder.

II. *May the majority effect such a fundamental alteration against the consent of a shareholder upon furnishing him security against loss?*

In *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42 (1858), application was made by a stockholder of the defendant company for an injunction to restrain it from consummating a proposed merger of that company into the Philadelphia & Reading R. R. Co. The merger was authorized by legislative act to take effect on approval by a majority of the stockholders of each corporation, the holders of stock in the defendant company to surrender the same and receive shares of stock in the Reading Company. No provision was made in the act or in the agreement for the case of any member of the defendant company who might not be willing to make the exchange.

The court holds that plaintiff could not be compelled to accept shares of the Reading Company in the place of his interest in the defendant company, but orders that the injunction asked for be granted only until the plaintiff be given security for the value of his stock. In *Stevens v. Rutland & B. R. R. Company*, 29 Vt.

³ *Durfee v. Old Colony, etc. R. R.*, 5 Allen 230; *Byrne v. Schuyler El. Mfg. Co.*, 65 Conn. 336.

⁴ *Price v. Holcomb*, 89 Iowa 123.

⁵ *Mason v. Pewabic Mining Co.*, 133 U. S. 50; *Thompson, Comm. on Law of Corporations*, Sec. 351; *Taylor v. Earle*, 8 Hun. 1.

545 (1851), after an exhaustive examination of the law and authorities the Chancellor grants an injunction restraining the defendant railroad from making an extension authorized by the legislature and accepted by vote of the majority stockholders, but not authorized by the original charter. Before the injunction issued it was proposed to file bonds to indemnify the plaintiff, but the Chancellor suggested that he did not deem it competent for him to make contracts for the parties. The Chancellor cited *Natusch v. Irving*, 2 Cooper Ch. 358, a case in which Lord Eldon had granted an injunction against an unauthorized extension of the business of a voluntary association at the suit of a dissenting member, although it was proposed to indemnify the plaintiff.

The decision in *Lauman v. R. R.*, that the consolidation might be effected if plaintiff was secured from loss, has been criticised,^{*} and the decision of the Chancellor in *Stevens v. R. R.* seems to be better law. It is not consistent with the contract of membership that the majority holders should have power to obtain from the legislature an alteration of the corporate undertaking and then compel a dissenting holder to accept their terms or retire from the enterprise. In the language of Lord Eldon, "the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in."

In the cases cited no provision had been made by the legislature for the valuation and extinction of a dissenting shareholder's interest. Since, however, the power of the majority is determined by the contract relation of the shareholders, no legislative act after the contract is concluded can enlarge that power. In a New Jersey case such legislative provision was made but it was treated by counsel and the court as an exercise of the right of eminent domain, and is discussed *infra*.[†]

It appears, therefore, that there is no recognized right in the majority holders to extinguish the rights and voice of a dissenting minority by taking their shares at a valuation.

III. *The power of the majority as affected by a reserved right of amendment and repeal.*

Statutory provisions, in force at the time of the stock subscription, authorizing consolidation upon vote of the majority holders,

^{*} *Black v. Dela. etc. Canal Co.*, 22 N. J. Eq. 130, see p. 405; *Mowrey v. Ind. R. R.*, 4 Bissell U. S. 78; *Federal Cases*, No. 9891; *Thompson, Comm. on Law of Corporations*, Secs. 343, 351.

[†] *Black v. Dela. etc. Canal Co.*, 24 N. J. Eq. 455.

are a part of the contract of membership. Such statutes have sometimes provided for the appraisal of the shares of a dissenting holder. But a difficult question arises where there is merely a constitutional or legislative reservation of power to amend, alter or repeal the charter of the corporation, and by a subsequent amendment or general law the legislature authorizes an extension of the corporate business or a consolidation.

Several cases have held that, where such power of amendment is reserved, an enlargement of the corporate undertaking by legislative authority, if it does not constitute a fundamental alteration, will not discharge a subscriber to the stock.⁹ Two courts, those of Massachusetts¹⁰ and Connecticut,¹¹ have gone further and declared that a consolidation may be effected against the consent of the minority stockholders if a general power of amendment has been reserved. But they cannot be regarded as concluding the question, since it might be decided *contra* by courts which take the position that such power is reserved for the protection of the public interests, and concerns the contract between the State and the corporation, not that between the shareholders.¹² If the latter be the correct view, it follows that under such reserved power of amendment the legislature cannot provide for the appraisal and extinction of shares of a dissenting holder. The contract which protects him from being unwillingly carried into a new venture will equally protect him from being unwillingly driven out of the old.

IV. *The right of eminent domain.*

In this situation of the law it has been suggested that the share of a dissenting stockholder may in certain cases be extinguished by condemnation.

Several eminent text-writers apparently endorse this suggestion.¹³ Their statements are based on a single case as authority: *Black v. Delaware & Raritan Canal Co. et al*, 24 N. J. Eq. 455 (reversing *Black v. Dela. etc. Co.*, 22 N. J. Eq. 130; 1871). In this case a stockholder of defendant companies sought to restrain

⁹ See *Buffalo, etc. R. R. v. Dudley*, 14 N. Y. 336.

¹⁰ *Hale v. Cheshire R. R. Co.*, 161 Mass. 443; *Durfee v. Old Colony, etc. R. R.*, 5 Allen 230.

¹¹ *Bishop v. Brainerd*, 28 Conn. 289.

¹² See Thompson, Comm. on law of Corporations, Secs. 90, 91, 347; *Oldtown R. R. v. Veazie*, 39 Me. 571; Green's *Brice's Ultra Vires*, pp. 98, 99, note; *Mowry v. Ind. & C. R. Co.*, 4 Bissell U. S. 78; Fed. Cases, No. 9891.

¹³ Cook on Stock and Stockholders, 3d Ed., Sec. 896; Morawetz, *Private Corporations*, 2d Ed., Sec. 1089; Beach, *Private Corporations*, Sec. 355; Green's *Brice's Ultra Vires*, p. 99, note.

them from executing a lease of their property and franchises to the Pennsylvania R. R. Company. The statute under which the right to execute such lease was claimed provided that the contract should be effected upon approval of two-thirds of the stockholders in each corporation, and that upon such approval any shareholder refusing to accept the terms of the contract should be paid the full value of his stock. The Chancellor denied the injunction, but his decree was reversed on appeal. Although the decision was placed expressly upon other grounds, the appellate court discusses the provisions of the statute referred to, and announces the principle that the shares of a dissenting holder may be so taken by eminent domain. The court based its declaration solely upon the well settled principle that corporate franchises are not exempt from condemnation, both the Chancellor and the appellate court concurring in the opinion that the act in question was constitutional.

It cannot be claimed that corporate shares are exempt from the exercise of the right of eminent domain, for all property is subject to the paramount necessities of the State and the public interest. But a consideration of the nature of corporate shares as property and of the conditions under which the right may be claimed, proves that there is but little occasion, if any, for the exercise of such right, while the propriety of its exercise in any instance may be seriously questioned.

While some authorities hold that it is within the power of the courts to decide in any instance whether the use for which the power is claimed is such as to justify its exercise, yet the power is political, belonging to the legislature, which must determine the necessity, the manner and the extent of its exercise. Yet the legislature should be controlled by a due regard for the rights of private property, as well as for the public necessities. The right is based upon the necessities of the public interest.

The interest of a shareholder is a proportional right in both the property and franchises of a corporation. To take his share from him is to extinguish his interest in both. It should not therefore be taken from him unless it is necessary for the public use designated that every corporate franchise in which he has such interest, be acquired or extinguished. The interest, also, of the parties exercising the power demands that the stock be left undisturbed unless they desire such acquisition or extinction of the franchise.

A necessity can rarely, if ever, exist for acquiring or extinguishing the franchises of any other than a quasi-public corpora-

tion, though it is possible that instances may occur where the franchise of a private business corporation might be so dependent upon special property for its value that to take such property would practically destroy the franchise. Except in some such rare instance, therefore, there could be no necessity and no desire to exercise the power unless for the acquisition or extinction of the active franchises of a quasi-public corporation. The property of such a corporation is already subject to a public use.

Unless it be proposed to subject the property to a use, public in its nature, not already within the charter powers of the corporation whose property is taken, the power of eminent domain should not be exercised. There can be no necessity or propriety in the taking, unless the rights of the public with reference to the property are to be enlarged. It is within the power of the State to enforce a full and satisfactory performance of its public duties by a quasi-public corporation. If such corporation fails in its duty, its charter may be forfeited, but its property and franchises may not be transferred to another. In this connection it is perfectly evident that the right of eminent domain cannot be exercised with propriety to enable the corporation itself, or a majority of its stockholders, to eliminate the interest of one or more shareholders, if the franchises of the corporation and its public duties are to remain unchanged. The State has no concern with the ownership of stock in a quasi-public corporation, whether it be in one person or another, for there can be no presumption that one shareholder will better than another perform the public service required through the corporate agencies. (If concerned at all, the State is interested that one quasi-public corporation should *not* own stock in another).

The Connecticut statute referred to enables the dominant holder to acquire by compulsory process any portion of the minority stock without any alteration in the corporate powers or duties. Although the stock so taken is directed by the statute to be cancelled, yet the taker is apparently left with power to dispose of the interest so acquired in such manner as it pleases. Some further act is necessary before the stock so taken can be regarded as taken for a public use.

This leads us to the vital objection to the exercise of the power in question, and that is, its indirection. Since the right will never be claimed except the majority holders desire to effect either an enlargement of the corporate powers or a transfer of the property and franchises, or a merger of one corporation with another, in either case it is clear that the real taking of the

property for the new public use occurs at the time when the corporation acts, whether by acceptance of a new charter, by transfer, or by agreement of merger. One process is *in invitum* against the stockholders, the other, which is the real taking, is dependent upon the voluntary action of the majority.

The right of eminent domain is properly exercised when property is required for public use and cannot be obtained by agreement with the owner. But the owner has no choice as to whether he shall part with his property. The State does not concern itself with his willingness or unwillingness to yield possession. Any supposed exercise of the right of eminent domain which is grounded upon consent instead of upon necessity is wrongful. If corporate franchises and property are required for a new public use, the necessity is the same whether one or all the shareholders object. In the instance cited, of *Lauman v. R. R. and Black v. Canal Company*, the latter of which was expressly announced by the court as an exercise of the right of eminent domain, the very fact that the right of consolidation was dependent upon the consent of a majority of the stockholders is itself quite conclusive against its necessity.

Many consolidations and extensions have been effected in which provision has been made for the appraisal of the shares of a dissenting holder. Legislative enactments authorizing such action customarily provide that a minority holder shall have his election whether to receive the value of his shares or to accept the terms upon which the majority participate in the new undertaking. The Connecticut statute is unique in denying that privilege.

In some instances such consolidations and extensions may have been demanded by the public interest, but it is a matter of common knowledge that they are usually undertaken for the profit or advantage of majority holders and the dominant corporation. The minority holder is justly entitled to a continuance of the original corporate undertaking according to the terms of his contract, unless the public interest demands its termination. That question of public use and necessity he is entitled to have decided independently of the wishes or advantage of the majority holders.

DETERMINING THE VALIDITY OF A PATENT ON DEMURRER TO A BILL IN EQUITY.

Probably in no branch of Federal Practice have the length and cost of the records become so voluminous as in patent cases. Nowhere else are the rules of evidence so grossly disregarded as in the taking of proofs in this class of cases. The length and irrelevance of cross examination have become a burden to courts and the contesting parties, and in several cases recently this tendency has been severely reprimanded by the courts.¹ Undoubtedly the circumstances under which the evidence in such causes is taken—before an examiner who has no power to exclude anything—tend to produce such unscientific and exhaustive records as are frequently presented to the court. When we count the fees of counsel and witnesses, the services of the master and stenographer or type writer, the printing, sometimes done twice, and the time and labor expended by the counsel and court in threshing out the wheat from the straw on the final hearing, we can readily imagine the enormous expense of an elaborate patent suit. The result of this tendency is not only in severe reprimands by the courts, but in a growing desire to dispose of the vital question in a patent case before the final hearing. To this desire is undoubtedly due the practice which is the subject of this paper.

This practice is substantially as follows: Where a bill of equity prays for an injunction against the infringement of a patent, the defendant may raise the question of the validity of the patent in suit, not only by answer and proof, but also by demurrer to the bill on the ground that the patent is invalid on its face. Necessarily the practice of demurring to the bill on this ground must be limited in its application, as ordinarily it is impossible for the courts to pass on a complex and intricate patent without the assistance of proofs. On the other hand, where the patent is for a simple device which relates to a familiar subject, and may be easily understood without the aid of expert

¹ *Ecaubert v. Appleton*, 67 F. R. 924; *City of Carlsbad v. Kutnow*, 71 F. R. 172.

testimony or extrinsic evidence, the courts have generally accepted the doctrine that the validity of the patent may be determined on demurrer to the original bill, and in some circuits a number of cases have been disposed of in this manner.

It is the purpose of this paper to review briefly a number of the leading cases of the different circuit and Supreme Courts in an endeavor to ascertain the various conditions, limitations, and tests applicable in the conduct of cases of this description. The practice appears to be of recent growth, the cases are still few in number, and only during the last year or two has the practice been stamped by the Supreme Court with its seal of approval.

In considering the general practice of dismissing a bill on the ground of invalidity of the patent in suit, the point being raised by a demurrer, a start must be made from a well settled rule of patent practice, which is, that the question of the validity of a patent is always open to the consideration of the court, whether the point is raised in the pleading and proof or not. Where suit is brought on a patent, and the answer does not set up the defense that the patent is unpatentable, the court may *sua sponte* declare the patent void, even if the objection is not taken by counsel. This rule has been sanctioned by the Supreme Court in a number of cases of which *Dunbar v. Myers*² and *Brown v. Piper*³ are generally considered the leading. The rule is not unfair nor unjust to the complainants in a suit brought on letters patent, for if the patent is void, because the device or contrivance described therein is not patentable, it would ill become a court of equity to render money decrees in favor of a complainant for the infringement of a patent which the court could see was void on its face for want of invention.⁴

If the Supreme Court on appeal can without reference to the pleadings and proof, but merely from an examination of the patent itself say that the patent is void, there appears to be no valid reason why a court of original jurisdiction cannot do the same, especially where the point is raised on demurrer.⁵ If the pleadings are not necessary to the court, why have them? Why not bring the point up immediately without the necessity of further pleadings and elaborate proof?

A patent may be declared invalid from a number of causes,

² *Dunbar v. Myers*, 94 U. S. 187.

³ *Brown v. Piper*, 91 U. S. 44.

⁴ *Slawson v. Grand St. R. R. Co.*, 107 U. S. 649.

⁵ *West v. Rae*, 33 F. R. 45.

and the cases in which the validity is tested by demurrer may roughly be divided into three classes—1st, those in which the patent is alleged to have some inherent defect apparent on its face; 2d, those in which the patent is alleged to be invalid in view of the state of the prior art as set forth in the bill; 3d, those in which the prior art must be drawn from (1) common knowledge of mankind of which the court takes judicial notice, or from (2) the specification of the patent itself, and in view of which prior art the patent is alleged to lack invention.

It should be noted that in these cases, the patent itself is made part of the bill. This may be done by setting forth the patent in full, or the bill may make profert of the patent, or the patent may be attached as an exhibit. Where a formal profert is made or the patent attached as an exhibit, the courts have held that this is sufficient to make the letters patent part of the bill.*

1. Where there is something in the patent itself which is repugnant to the principles of the patent law, as for instance that the patent is for a law of nature,⁷ or the function of a machine,⁸ the courts have not hesitated to declare the patent void, on demurrer, as the defect is apparent on the face of the patent.

2. A somewhat different question arises where the invalidity of a patent is established not from some defect inherent in the patent, but by extrinsic evidence. In the trial of patent cases usually the most important element in passing on the validity of a patent is what is known as the state of the prior art; which is proof of what is old and in general use at the date of the invention.⁹ It may consist of printed or written documents; of oral testimony of witnesses familiar with the particular art to which the invention applies; or of specimens and exhibits of devices then employed.¹⁰ This extrinsic evidence or prior art is necessary to show what was old, to distinguish what was new, and to aid the court in construing the patent.

If a patent has no inherent cause for being declared void, and extrinsic evidence is necessary to prove unpatentability, how can such evidence be presented to the court for its consideration on

* *Heaton Peninsular Button Fastener Co. v. Schlochtmeier*, 69 F. R. 594; *Dickerson v. Greene*, 53 F. R. 247; *Bogart v. Hinds*, 25 F. R. 484; *Indurated Fibre Industries Co. v. Grace*, 52 F. R. 124.

⁷ *Wall v. Leck*, 61 F. R. 291; 66 F. R. 552.

⁸ *Locomotive Works v. Medart*, 15 Supreme Court Reporter, 751; 158 U. S. 68.

⁹ *Brown v. Piper*, 91 U. S. 44.

¹⁰ *Robinson on Patents*, Sec. 1020.

demurrer, where the allegations are merely the allegations of the complaint? When the complaint contains statements or offers exhibits which set forth the prior art, this difficulty is removed. Take for example a case where two patents of different date are sued upon in the same bill. Obviously the court may consider the two patents together, and from such consideration may decide that there is no advance in the art in the second patent over the first dated, and consequently that the second is not patentable in view of the first. In *Bottle Seal Company v. De La Vergne Bottle and Seal Company*,¹¹ the court had two patents of different dates before it, and in considering the second, took the first as exhibiting the state of the prior art. An interesting case of this character is that of *Russell v. Kern*,¹² where a bill in equity was brought on ten patents, and an injunction prayed for. The four earlier patents were found to have expired before suit was commenced, and the fifth in date before the return day. The court dismissed the bill in respect to these five patents for want of equity. But the first five patents, being in the bill, were considered by the court as setting forth the prior art, and on demurrer it was held no invention existed in the last five patents over the first five.

Another case of this character arises where suit is brought on a re-issued patent. In a re-issue the original patent must have been surrendered and the re-issue applied for within two years of the date of the granting of the original.¹³ If the original patent and the re-issue are both made parts of the bill, as exhibits, etc., and a delay of more than two years appears in applying for the re-issue, not explained by special circumstances, showing it to be reasonable, the Supreme Court has held that laches may be availed of as a defense, upon a general demurrer for want of equity.¹⁴

3. But take the third class of cases; where no earlier patent is set forth in the bill, and merely the patent sued upon and under consideration is before the court, and it contains no inherent defect. The pleadings do not present any prior art from which the court may decide the question of patentability.

The case of *Brown v. Piper*¹⁵ before the Supreme Court in 1875, was a case decided upon bill and answer in the usual form,

¹¹ 47 F. R. 61.

¹² 69 F. R. 97.

¹³ *Miller v. Brass Co.*, 104 U. S. 350.

¹⁴ *Woolensak v. Reiher*, 115 U. S. 96.

¹⁵ 91 U. S. 37.

and the patent in issue was for a process of preserving fish by freezing. In passing on the validity of the patent the court went entirely outside of the pleadings and proof, and took judicial notice of the ice cream freezer as a complete anticipation of the alleged invention. Justice Swain, in delivering the opinion, said: "Of private and special facts, in trials in equity and at law, the court or jury, as the case may be, is bound carefully to exclude the influence of all previous knowledge. But there are many things of which judicial cognizance may be taken. Facts of universal notoriety need not be proved. Among the things of which judicial notice is taken, are: the law of nations; the general customs and usages of merchants; things which must happen according to the laws of nature; the meaning of words in the vernacular language, etc., etc. Courts will take notice of whatever is generally known within the limits of their jurisdiction; and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in cases brought before him." The court also said: "It is known that Lord Bacon applied snow to poultry to preserve it. He said the process succeeded excellently well. The experiment was made in his old age, imprudently, and brought on his last illness." Whether the court in its recital of this lamentable result of Lord Bacon's experiment would uphold the doctrine that all such facts of history may be taken judicial cognizance of, it is not safe to say. But the practice of taking notice of matters of common knowledge in patent cases, even when not set up in the pleadings, has been sanctioned by the Supreme Court also in a number of other decisions.¹⁶

The question arose in 1885 in the Circuit Court, in the case of *Dick v. Oil Well Supply Company*¹⁷ whether, where there was no answer, and the issue was raised upon demurrer to the bill, the court could also take judicial notice of matters of common knowledge in passing upon the validity of the patent. In this case and in that of *Kalotype Engraving Company v. Hoke*¹⁸ in 1887, the courts declared that if facts existed of which the court was bound to take judicial notice, and these facts clearly established want of invention, undoubtedly the patent could be declared void on demurrer. But in neither case was the court willing to decide it on that ground, and the defendants were ordered to proceed in the usual manner by answer and proof.

¹⁶ *Dunbar v. Myers*, 94 U. S. 187; *Slawson v. R.R.*, 107 U. S. 649.

¹⁷ 25 F. R. 105.

¹⁸ 30 F. R. 444.

In the same year as the latter of the above cases, a suit was brought in the second circuit on a patent for a design for rubber mats, having corrugations for producing varied effects of light and shade.¹⁹ The defendants demurred on the ground that there was no invention, and Judge Wallace sustained the demurrer, taking judicial cognizance of wood, plaster, and corduroy cloth, in which depressions and elevations in the surface produce variations in light and shade. Upon appeal to the Supreme Court²⁰ the decision of the circuit court was reversed, and it was held that the demurrer should have been overruled. "Whether or not the design is new is a question of fact, which whatever our impressions may be, we do not think it proper to determine by taking judicial knowledge of the various designs which may have come under our observation. It is a question which may and should be raised by answer, and settled by proper proof."

The case of *West v. Rae*, 33 F. R. 45, decided by Judge Blodgett in the Seventh Circuit in the same year was the first wherein facts in common knowledge noticed judicially by the court, a view of mechanical patent was held void on demurrer, and hence has been looked upon as a leading case on the subject in the subsequent decisions. The patent was for paper bags for packing blankets, both ends of the bags to be pasted or otherwise secured.

The court held the patent anticipated by bags for flour, groceries, etc., in common use, of which he took judicial notice. In his opinion Judge Blodgett said: "I am not aware that the practice of raising by demurrer the question, based on common knowledge, that a patent is void for want of novelty, has the direct sanction of any adjudged case, but the books abound in cases where the court has of its common knowledge *sua sponte* held patents void for want of patentable novelty. In the light of these authorities I cannot see why, in a suit for infringement of a patent so clearly and baldly void as this, the court ought not to save the defendant from the vexations and expense of a trial upon proofs by sustaining the demurrer to the bill."

In the following year Judge Shipman in the case of *Blessing v. Copper Works*,²¹ which was a case at law, said: "It is well settled that in a bill in equity for the infringement of a patent, if the patent is void on its face by reason of want of patentable invention or of novelty, when the pre-existing device is a thing

¹⁹ *N. Y. Belting & Packg. Co. v. N. J. Car-Spring & Rubber Co.*, 30 F. R. 785.

²⁰ 137 U. S. 445.

²¹ 34 F. R. 753.

in common knowledge and use of people throughout the country, the court may stop at the instrument itself, and without looking beyond it, adjudge in favor of the defendant."

Following these two cases come a long line of decisions, some in almost every circuit, in which demurrers have been brought to the bill on the ground of the apparent invalidity of the patent, and whichever way the particular case was decided, the practice has been upheld. Judge Blodgett, in a later case²² said that at the time he announced his decision in *West v. Rae* (*supra*), he stated that the effect might be to encourage counsel to demur to bills for infringement of patents in cases where they, from their special knowledge of the art, might be of opinion that the device covered by the patent was old. And his anticipations in that respect were fully realized, as that decision produced in his court a bountiful crop of demurrers in this class of cases.²³ The reason for this is obvious. The great cost of a long litigation is avoided if the demurrer is sustained as the validity of the patent is determined at the outset.

An exception to the general acquiescence in this practice came in the form of a vigorous protest by Judge Putnam in the First Circuit, in the case of *Industries Company v. Grace*, 52 F. R. 124, and reiterated in *Henderson v. Tompkins*, 60 F. R. 758. The latter is a copyright case but the practice under consideration received elaborate treatment therein. "No doubt," said Judge Putnam, "there is a limited class of cases in which the court must on demurrer, from the standpoint of judicial notice, disregard allegations in the bill of novelty, patentable invention, and utility. But it must be noted that there is a broad distinction between cases heard on bill, answer and proof, and those on demurrer, although it may be that in the former class the court may sometimes be compelled to dispose of questions of originality from the same common knowledge and experience which it is asked to apply in disposing of this demurrer. As *Brown v. Piper* (*supra*) was heard on bill, answer and proofs, the complainant has full opportunity, and all the facts were before the court. On such a record, the court as judges of the fact, could with propriety, say that there was nothing on the face of the patent itself which could require its attention. This distinction is not a vain one, because erroneous matter of law, if perpetuated, becomes a deformity, while findings of fact, if likewise erroneous, are swept

²² *Eclipse Mfg. Co. v. Adkins*, 36 F. R. 555.

²³ *Studebaker Bros. Mfg. Co. v. Ill. Iron & Bolt Co.*, 42 F. R. 52; *Buckingham v. Springfield Iron Co.*, 51 F. R. 236.

away and become a portion of the undigested mass of such findings. Assumption on the part of courts of knowledge which they may not in fact possess, followed by numerous dismissals of suits on demurrer would involve the hazard of barring meritorious causes contrary to the express allegations of the bill."

A point is raised in this quotation particularly worthy of notice. The learned judge states that the court to declare a patent void on demurrer, must disregard the allegations in the bill of novelty, patentable invention, and utility. The usual, if not invariable, form of the statement in the bill as to novelty, etc., is that the patentee is the "original and first *inventor* of the alleged invention;" that the invention "had not been known or used by others in this country, and had not been patented or described in any printed publication in this or any foreign country before the invention and discovery thereof, and had not been in public use or on sale for more than two years prior to the application for letters patent, etc." The demurrer admits the allegations of the complaint, and yet in spite of the admitted novelty and utility of the invention, the insistent is that such novelty and usefulness are really negatived by the letters patent in question or by matters of common knowledge. Surely here is a strange incongruity. And yet in cases where the courts have particularly pointed out this glaring inconsistency resulting from the contradiction of the pleading by the contention of the defendant, the practice has been upheld and the demurrer sustained.²⁴

The excuse for this is undoubtedly that stated in *Brown v. Piper* (*supra*), and to accomplish substantial justice, a seeming inconsistency in the pleadings is waived or overlooked.

In the earlier cases decided by Judge Putnam,²⁵ it was said that the Supreme Court had in no case distinctly approved nor condemned the practice, as in *N. Y. Belting and Packing Company v. N. J. Car Spring and Rubber Company*²⁶ the decision of the circuit court was reviewed without particularly or clearly passing on the practice. Since Judge Putnam's decision two decisions have been handed down distinctly upholding the practice. The first of these was that of *Risdon Iron and Locomotive Works v. Medart*,²⁷ and the suit was one of infringement on three patents for belt pulleys and the manufacture of the same. The defendant demurred to the bill on the ground that the patents did not

²⁴ *Bottle Seal Co. v. De La Vergne Bottle & Seal Co.*, 47 F. R. 59; *Dick v. Oil Well Supply Co.*, 25 F. R. 105.

²⁵ *Indurated Fibre Industries Co. v. Grace*, 52 F. R. 124.

²⁶ 137 U. S. 445.

²⁷ 158 U. S. 68.

show invention upon their faces. The demurrer was argued and overruled, and the case subsequently heard upon pleadings and proof. From the decision of the lower court, appeal was taken, and the Supreme Court (Justice Brown delivering the opinion), held that the patents were invalid and the demurrer to the bill should have been sustained. The decision relative to two of the patents sued upon comes rather under that class of cases alluded to earlier, where an inherent defect exists in the patent—the patents being held functional, and a matter of degree, respectively. But the third patent was defeated on the prior art as set forth in the specification.

The second case by the Supreme Court²² (the opinion again being by Justice Brown) even more clearly approves the practice which is under our consideration. Here the court says: "While patent cases are usually disposed of upon bill, answer and proof, there is no objection, if the patent be manifestly invalid upon its face, to the point being raised upon demurrer, and the case being determined on the issue so formed. We have repeatedly held that a patent may be declared invalid for want of novelty, though no such defense be set up in the answer."

Moreover the patent was held anticipated by the fact that all the parts of the combination of the patent were well known, and the court took judicial notice of such common knowledge, and decided that there was mere aggregation of old parts and not a patentable combination.

Even with this sanction of the Supreme Court, the practice is still considered one to be availed of only in the clearest cases, especially in view of the many patents of seeming great simplicity which have been upheld by the Supreme Court after considering the evidence introduced in their support.²³ "The court must be able from the statements on the face of the patent, and from common and general knowledge, to say that the want of invention is so palpable that it is impossible that evidence of any kind could show the fact to be otherwise."²⁴

With such strictures as to the application of the practice, many limitations may be expected in the utterances of the court as to the questions of (1) what is the common knowledge to be judicially noticed by the courts, and (2) how far the specification of the patent may be considered as setting forth the prior art.

1. The court is not at liberty to apply any special or peculiar

²² *Richards v. Chase Elevator Co.*, 158 U. S. 299.

²³ *Davock v. Chicago & N. W. R. Co.*, 67 F. R. 469, and cases cited therein.

²⁴ *Am. Fibre Chamois Co. v. Buckskin Fibre Co.*, 72 F. R. 511.

knowledge which it may possess, or apply to the patent the skill possessed by experts, but may only apply that knowledge which is possessed by ordinarily well-informed people.²¹ Things within the common knowledge and use of the people throughout the country²² only are before the court. In one case²³ where the patent was for a walking track, Judge Shipman said: "I am not aware of any common knowledge upon the subject of walking tracks within doors," etc. The practical difficulty and danger is in defining where special knowledge leaves off and common knowledge begins.²⁴ Various methods of determining what is common knowledge have been suggested by counsel and considered by courts.

In the case of *Brown v. Piper*²⁵ (discussed above), the court, after citing the cream freezer as an anticipation, quoted from various encyclopedias and dictionaries. Acting on this suggestion the court in *American Fibre Chamois Company v. Williamson*²⁶ referred to various reviews, encyclopedias and Knight's dictionary to prove that the patent was old. It might well be asked, why limit the court to dictionaries, reviews, etc.,—why not consider any sort of treatise, and all former patents, as embraced in the common knowledge, for it most certainly cannot be urged that the ordinarily well informed person *knows* the contents of encyclopedias, dictionaries, etc. When the Fibre Chamois case, therefore, came before the appellate court, Judge Taft reversed the decision,²⁷ on the ground that the court had gone out of the sphere of common knowledge into special. He lays down the rule that the court may refer to books of this description to support his views, if he *first* can point out well known instances easily within the actual knowledge of the court. In other words that the court may *refresh* his memory by referring to standard works,²⁸ but not create a knowledge thereby.

The same view was taken in *Bottle Seal Company v. De La Vergne Bottle and Seal Company*,²⁹ and the further point was raised whether earlier patents or designs could be considered in establishing what was common knowledge. It was held that the

²¹ *Cleveland Faucet Co. v. Vulcan Brass Co.*, 72 F. R. 507.

²² *Root v. Sontag*, 47 F. R. 310.

²³ *Coop v. Physical Development Institute*, 47 F. R. 899.

²⁴ *Eclipse Mfg. Co. v. Adkins*, 36 F. R. 554.

²⁵ 91 U. S. 37.

²⁶ 69 F. R. 247.

²⁷ *Am. Fibre Chamois Co. v. Buckskin Fibre Co.*, 72 F. R. 514.

²⁸ *Brown v. Piper*, 91 U. S. 37.

²⁹ 47 F. R. 63.

only way by which knowledge of anticipating devices or letters patent could be brought to the court was by due and legal proof.

"It has never been supposed that letters patent could be taken judicial notice of by the courts. There is nothing in their character nor their contents to so dignify them. They are simply contracts reduced to writing, capable of being recorded, and of being proved in a particular way." So Judge Coxe held^a regarding a number of exhibits introduced with the demurrer.

2. As to the extent in which the specification of the patent may be considered as setting forth the prior art, there appears to be an irreconcilable disagreement in the adjudged cases. On the one hand there are numbers of cases in which the statements of the patentee as to the previous methods or devices over which he has improved, are taken as admissions on his part as to the prior art, and from such statements the patentability of the particular patent decided. On the other hand courts have refused to be bound by the statements as they appeared in the specification, without an opportunity being given the complainant to explain or construe such seeming admissions.^b Judge Putnam gives utterance to the following^c, "A bill in equity does not necessarily make all the statements of fact contained in a contract or letters patent proper parts of the pleading by making profert, or reciting the tenor at length. In letters patent the claims become a fundamental part of the bill and so much of the specification as is necessary to construe the claims. But all portions which merely set forth the state of the art are like recitals of facts in contracts or other instruments, more or less conclusive on the party who sets them up, yet in law explainable and not absolutely presumed to have been so alleged as to become the subject of demurrer. * * * It is true that so far as the specification contains any representations which, if erroneous, may be presumed to have misled the Patent Office to the detriment of the public, the patentee may be estopped. On the other hand, I do not understand that the law has gone so far as to forfeit a valuable patent because the patentee has inaptly or somewhat inaccurately, described the state of the art, or that it conclusively prohibits him from showing such inaptitude or inaccuracy, if it also appears that the public has not been prejudiced thereby." In commenting on this language Judge Sage presents the opposite view in *Heaton Peninsular Button Co. v. Schlochtmeyer*,^d

^a *Lalance & Grojean Mfg. Co. v. Mosheim*, 48 F. R. 452.

^b *Coop v. Savage Physical Development Co.*, 47 F. R. 899.

^c *Indurated Fibre Industries Co. v. Grace*, 52 F. R. 124.

(since affirmed by the circuit court of appeals in the Sixth Circuit"), thus: "The patent is the title deed through which the complainant must derive all his rights. It is the grant of a monopoly, and with rare exceptions, every statement of the prior state of the art therein contained bears upon the construction, and is a limitation of the grant. The description in the specification of the existing art, and of the applicant's improvements, form the representations upon which he obtains the grant. Having done so, he is estopped to say that his representations were incorrect. If the recitals of the state of the art do not tend to limit, explain, or nullify the grant, they are of no possible pertinence, even if the same facts were fully proved *aliunde*. If, on the other hand, they do have such tendency, the patentee is bound thereby, and the patent must be construed in the light of the facts so recited."

In two cases⁶⁶, the courts have declined to consider prior patents cited in the patent in suit, showing the prior art, as before them for their consideration. The mere fact that reference is made to a former patent, does not bring that patent to the knowledge of the court or spread its claims or description upon the record. It must be proved by legal testimony in the usual way.

Where the patent in issue contains a specific disclaimer, the courts have considered such disclaimers as admissions on the part of the patentee, and from them determined the prior art.

A minute study of the statements of the prior art in the patents in the various suits⁶⁷ is apt to lead to the conclusion that almost any statement in the patent may be considered by the court as setting forth the prior art and as an admission and part of the bill. Especially does this statement seem correct in view of the Supreme Court case, *Locomotive Works v. Medart*⁶⁸, where the court took the usual statement of the specification as to previous devices as an admission on the part of the patentee as to the prior art.

If this conclusion is correct it behooves solicitors of patents to be more careful of their statements of the prior art, or else confine themselves strictly to a description of the device in hand and avoid all mention of the prior art, as they would ice marked "Dangerous."

⁶⁶ 69 F. R. 592.

⁶⁷ 72 F. R. 524.

⁶⁸ *Drainage Construction Co. v. Englewood Sewer Co.*, 67 F. R. 141; *Cleveland Faucet Co. v. Vulcan Brass Co.*, 72 F. R. 506.

⁶⁹ 61 F. R. 291; 47 F. R. 309; 72 F. R. 508, and others.

⁷⁰ 158 U. S. 68.

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THE abuses rendered possible by the present laws on bankruptcy and insolvency as they exist in the several States, appear at last to have aroused our law makers to the necessity of uniform legislation upon this subject. The Torrey Bill, passed by the lower House of Congress on May 2d, is a measure admirably adapted to secure the end in view. The act prohibits assignments with preferences to particular creditors, which are still in vogue in those States where common law assignments have not been restricted by remedial statutes; protects the debtor by compelling the creditors to act collectively in involuntary proceedings; and restricts the expenses of administering a bankrupt's estate to reasonable fees. One of the most objectionable features in the popular mind about the law of 1863, was that all cases were tried by the Court; but in the bill of Judge Torrey jury trial is preserved. It is to be hoped that, inasmuch as the so-called patriotic ardor aroused in the Senate by recent international complications is happily subsiding, that body will now turn its attention to much needed legislation upon domestic questions and pass the House Bill in such form as to preserve its salutary provisions. The existing system, by allowing individual creditors to institute proceedings in involuntary bankruptcy, not only frequently involves the debtor in ruin and squanders large amounts from his estate in useless costs; but, as large business houses usually have creditors in several different States a proceeding in involuntary bankruptcy under a state law does not

operate to discharge obligations except within its own jurisdiction, and a debtor may, by action of an individual creditor, be thrown into a condition of hopeless insolvency by the effects of which he may be forever debarred from engaging thereafter in commercial activity.

* * *

THE proceedings now in progress against the joint Traffic Association which was formed in October, 1895, by the great trunk lines between New York and Chicago are of great interest and involve results of wide industrial importance. In its present form this is a suit by the Interstate Commerce Commission against the Association on the ground that its existence is under the ban of the Interstate Commerce Act and the Anti-Trust Law; in its real import the case is a test of the fitness of essential features of this legislation for present conditions of transportation. For if the Association is upset as a result of this case it will indicate pretty clearly some fundamental mistakes in our present industrial legislation. It can hardly be questioned, except by some enthusiasts, like the bellicose Senator from New Hampshire, that the Joint Traffic Association was formed with the bona fide intention of stopping the ruinous cutting of rates on competitive traffic. Such an object is of as much importance to the community as to the railroads themselves. This has been one lesson which the hard times of the last few years have cruelly emphasized by their unpaid dividends, railroad insolvencies and armies of unemployed workmen. During this period many traffic associations have been formed all over the country, some undoubtedly with the mere design of booming the market, but more of them with the genuine purpose to maintain rates and prevent rate wars. Two obstacles have stood in the way of their success. The tie which binds these incoherent bodies is the fear of death, and when this fear is removed self interest drives them apart. But added to this there is an artificial cause which has wholly prevented any strength or permanence of organization in the clause of the Interstate Commerce Act which prohibits pooling agreements. This clause was originally passed to soothe the extreme party who stood for Government control of railroads in 1886. Since that day its chief advocates have repudiated it. But it has withstood the best directed attacks and still remains as the main obstacle to the maintenance of railroad rates. Under this clause the present Traffic Association is attacked, and certainly its general scheme looks to an outsider as a pretty close imitation of a "pooling agreement." The Anti-Trust law is also

invoked as forbidding the existence of such an organization on the grounds of its checking the free action of competition. In view of this situation the present case must produce one of two results. Either the Courts will find a way to declare such an Association legal, which would really make the pooling clause a dead letter, or else, by holding the organization unlawful under these statutes, they will furnish the most emphatic proof that to this extent these laws do more harm than good, and that it is of vital importance to sweep away these mistakes and make the law such as to meet actual industrial needs.

* * *

THE result of the recent debate between representatives of Yale and Harvard Universities is exceedingly gratifying to the friends of the former. It will undoubtedly have the effect of stimulating an interest already begun here in forensic training. There are two kinds of debating. One evidences a use of the mental processes; the other is popularly described as "windy," and lacks everything but form. It is probably because of the prevalence of the latter kind everywhere that many of the representative men of Yale have heretofore looked coldly on at the effort to revive the art of public speaking among the students here. There is much value in gracefulness of speech, if there is substance with it, and there is nothing more dangerous than a glib tongue in the possession of a person of shallow mind. It is for this very reason that men whose intellectual equipment justifies a public utterance of their thoughts should by special training prepare themselves for the most effective presentation of them. Otherwise there is great probability that the demagogue will triumph in spite of the fallacy of his arguments. An average American audience will generally be more favorable to style without logic than to logic without style, but a combination of both is invincible. It is matter for congratulation that the Yale representatives in the debate with Harvard appreciated these truths and were capable of acting accordingly.

RECENT CASES.

SALES.

Vendor and Purchaser—Contract—Interpretation.—*Stewart v. Arendt*, 37 N. Y. Supp. 684. When in a contract there is a statement that the consideration for a sale of lands is a certain sum of money, and later from definite and particular terms showing the method of payment it appears that the consideration was a greater sum, the latter statement will prevail.

Sales—Action for Deceit—Principal and Agent.—*West Florida Land Co. v. Studebaker*, 19 Southern Reporter, 176 (Fla.). This was an action for fraud and deceit in the sale of lands. The court held that an action at law could be maintained for fraud of this sort, that principals are liable *civiliter* to third parties for the deceit of their agents when committed in the course of the principals' business, and that proof of other frauds of the same character committed by the same parties at approximately the same time was admissible to show the motive for the fraud in question.

Sale by Sample—Evidence—Value of Goods.—*Eiseman et al. v. Heine et al.*, 37 N. Y. Sup. 861. In an action for breach of contract of sale, the acknowledgment of agent that an order was received and that an attempt was made on his part to fill it will be admitted as evidence to show existence of contract. When the sale was made by sample the injured party will be allowed to estimate his loss by showing value of goods, according to quality claimed by him to be represented by the sample.

Sale—Written Notice by Vendee—Warranty.—*J. F. Seibling & Co., v. Newton*, 43 N. E. Rep. 151 (Ind.). In an action for the price of a machine sold with warranty on a contract requiring immediate written notice to vendor if the terms of warranty were not satisfied, it was held that as the plaintiffs' agent was present at the trial of the machine and, failing to make it do good work, told the vendee to return it, the written notice was waived.

Sale—When Title Passes—Attachment.—*Gates Iron Works v. Cohen*, 43 Pac. Rep. 667 (Col.). Plaintiff agreed to furnish a concentrating mill to defendant who promised to pay for it if on being tested it proved capable of doing the required work. The mill was erected on a foundation of solid masonry upon defendant's

land and in a building owned by defendant, but before it had been fully tested a creditor of defendant levied upon it and the land upon which it stood. Held, that title to the mill never having passed to defendant, such creditor acquired no interest in it.

Specific Performance by Part Owner—Sale by Agent.—*Cochran v. Blount et al.*, 16 Supreme Court Rep. 454. L, a part owner of a tract of land, placed the property in the hands of an agent for sale. The agent made a contract of sale which was approved by L and by some of the part owners. The other owners refused to sanction it and thereupon L withdrew his approval. The purchaser then brought suit against L to obtain specific performance. Held, that a decree of specific performance could not be granted unless it were shown that L held himself out to the agent as full owner or as authorized to dispose of the shares of the others.

PARTNERSHIP.

Partnership—When Exists.—*State Bank of Luskton v. O. S. Kelley Co.*, 66 N. W. Rep. 619 (Neb.). Where two farmers purchased a threshing machine, paying for the same by joint and several notes and jointly used the machine in threshing grain for others, it was held that the evidence warrants the conclusion of joint ownership rather than partnership.

Partnership—What Constitutes.—*Stratton v. O'Conner et al.*, 34 S. W. Rep. 158 (Texas). Cattle were furnished by defendant to another at a fixed valuation upon an agreement that the latter should care for and keep them for four years when they should be sold, their cost repaid to defendant and the remaining profits or loss, if any, should be shared equally. Held, that the arrangement constituted a partnership and defendant was liable for the indebtedness incurred by his partner in keeping the cattle.

Partnership—Order of Supersedeas—Contempt of Court.—*Silliman et al., v. Whitmer et al.*, 34 Atl. Rep. 56 (Penn.). A partner who is served with a supersedeas order staying operations which are in charge of another partner, is guilty of contempt of court if he fails to transmit the order to the partner in charge.

Partnership—Accounting by Survivor.—*Little v. Caldwell*, 44 Pac. Rep. 340 (Cal.). Two law partners made a written contract to conduct certain litigation for fifteen per cent of the amount recovered, which was afterwards modified by parol to the extent that the clients should defray part of the expense of the suit.

After the death of one of the partners, the surviving partner and the client agreed that the survivor should continue the suit, paying all costs, and if finally successful, should receive forty-five per cent in addition to the original contingent fee which the firm were to receive. The deceased partner's heirs afterwards executed to the surviving partner an assignment of their rights in the original contract upon the consideration that he "would do what was right" by them if the suit was successful. Upon the success of the suit the court held that inasmuch as the several agreements did not constitute separate contracts but formed modifications of the original written contract, the deceased partner's heirs were entitled to half of fifteen per cent of the amount of the judgment obtained.

Promissory Note—Place of Payment—Insolvent Firm—Member's Rights as Creditors—In re Parisian Cloak & Suit Co.'s Estate, 34 Atl. Rep. 224 (Penn.). When two insolvent partnerships have practically the same composition in their membership but one is creditor of the other, the former cannot participate in the distribution of the assets of the latter until the claims of the other creditors are satisfied.

Partnership Agreement—Construction.—Magilton v. Stevenson et al. 34 Atl. Rep. 235 (Pa.). A provision in a partnership agreement required an equal division of losses on condition that the partner who furnished the capital should not be put to any loss over a stated amount. Held, that the loss of said partner in excess of this definite amount was a joint and several liability of the other.

BANKRUPTCY.

Bankruptcy—Assignment.—Lancey v. Goss et al., 33 Atl. Rep. 1071 (Maine). Such items of estate as the assignee declines to appropriate or utilize remain the property of the bankrupt, always subject to the superior right and title of the assignee and creditors, and until such paramount right is asserted the bankrupt has a title good against all others.

Bankruptcy—Fraudulent Conveyance—Possession Retained by Mortgage.—Bank of Hazelhurst v. Goodbar et al., 19 Southern Reporter 204 (Miss.). The security which the appellant, one of the chief creditors and the assignee of an insolvent firm, accepted from its debtors included a mortgage of the stock of goods and store accounts, under contemporaneous oral agreement by which the debtors were permitted to continue their mercantile business,

using the mortgaged stock of goods therein, selling the same and reinvesting the proceeds. The conveyance was held fraudulent and void as to other creditors.

Insolvency—Discharge—Composition—Estoppel.—*W. L. Blake Co. v. Lowell*, 34 Atl. Rep. 264 (Me.). If an insolvent debtor withdraws the percentage gained on composition proceedings and withholds it he can not use the discharge to accomplish his own fraud by pleading it in bar of the suit of his creditor.

Bankruptcy—Assignment—Preferences.—*Goodbar Shoe Co. v. Montgomery*, 19 Southern Reporter 196 (Miss.). The appellant claimed that an assignment in which certain creditors were preferred was void. It was held that, as the assignment expressly stated that the assignee should pay "according to the true amounts legally due the creditors," and that any creditors whose names had been accidentally omitted should share under it, the objection alleged did not invalidate it.

MISCELLANEOUS.

Contracts—Consideration—*Eaton v. Libbey et al.*, 42 N. E. R. 1127. The defendants in this action maintain that a child was a stranger to the consideration of a note given to his parents for his benefit for the privilege of giving him a name, and that he, as plaintiff, could not sue on it. Held, that the consequence of a name affects the child more than any one else—that the child has an interest in the name imposed and that it forms a consideration which will give him right to sue on the note.

Libel and Slander—Book Review—Correct Statements—Criticism—Characterisation.—*Dowling v. Livingston*, 66 N. W. R. 225. The plaintiff published a book entitled "The Wage Worker's Remedy." The defendant's paper, *Detroit Journal*, in reviewing the book spoke of its author as appropriating the theories of other writers without giving them any credit, while his solutions of different labor problems were characterised as "quack remedies which would only intensify the trouble." The whole attack was full of sarcasm and ridicule, but there was no misstatement of fact. The court said, "When an author places his book before the public he invites criticism and however hostile that criticism may be and however much damage it may cause him by preventing its sale, provided the critic makes no misstatement of any material facts contained in the writing and does not attack the character of the author, there is no remedy."

BOOK NOTICES.

The Principles of the American Law of Bailments. By John D. Lawson, LL.D., Professor of Common Law in the University of the State of Missouri. Pages xv., 667. The F. H. Thomas Law Book Company, St. Louis, 1895.

As is announced on the title page this treatise by Mr. Lawson on the subject of Bailments is a companion to his previous work on Contracts and is written in the same spirit. We notice the same scientific point of view, the same attempt to treat the subject in hand by a close and logical analysis which the earlier text-book displays to such a marked degree. In following out this conception the author has rejected the conventional classification of bailments which has held undisputed sway in our text-books since the days of Lord Holt and Sir William Jones. In its place he adopts a division of the subject into ordinary and exceptional bailments, of which the first includes bailments for the sole benefit of bailor (*depositum* and *mandatum*), those for the sole benefit of the bailee (*commodatum*), and those for the mutual benefit of both parties (*pignus*, *locatio rei*). The second class of exceptional bailments covers the cases where the law imposes certain obligations of a public nature, such as innkeepers and common carriers. This classification is the chief novel feature of the book; it certainly lays out the field in a more scientific way than the older method of treatment, and it is open only to the objection that our authorities from time whereof the memory of man runneth not to the contrary have looked at the subject from the more artificial point of view—a fact which is of considerable practical importance.

Mr. Lawson's book will probably become the most useful elementary text-book on this practical subject, both on account of its thoroughness and its concise character. A first reading points to the chapters on common carriers and the concluding chapters on questions of proof and damages as of especial practical value.

Law of Garnishment. By John R. Rood. Sheep, 534 pages. West Publishing Co., St. Paul, Minn., 1896.

This is claimed to be the first text-book ever published which is exclusively devoted to the subject of garnishment. The author

clearly states in his preface the object and scope of the work: "It has been the one aim and effort to make a book of ready reference in which all the decisions upon any point of garnishment law and their bearings may be discovered with the least possible expenditure of time. It is not sought to lay down the law, but merely to furnish a key to it which shall in a trice open to the searcher the authorities upon any branch of the subject." To this end there is a topical and an analytical index, with a table of cases, and ample cross references. Conflicting authorities are clearly indicated. Among the matters treated of are "Persons who may be Garnisheed," "Property subject to Garnishment," "The Effects of Garnishment," and "Procedure in Garnishment Proceedings." Altogether it is a very useful book, and should be of great value to lawyers who have much to do with this class of cases.

Bodington-Kelley's French Law of Marriage. Half Law Sheep, 280 pages. Baker, Voorhis & Co. 1895.

In these days when international marriages are becoming more and more common, a new edition of Kelley's French Law of Marriage which has recently come into our hands for review is most timely. This volume will prove of interest not alone to the student of Private International Law, but the American who is about to marry a citizen of France, may well consult its pages and learn the effect of French law upon such a contract. The author, Edmond Kelley, an American residing and practicing law in Paris, wrote for the *American Law Review* an article on the French Law of Marriage and this, having proved of much interest to the public, it was enlarged into book form and published in 1885. The present edition has been revised and enlarged by Oliver C. Bodington of London, so as to contain the text and translation of the new articles imported into the French Code by the Divorce Laws of 1884 and 1886 and generally to carry the text and authorities down to date. The book is printed in bold, clear type and divided into chapters and sections devoted to such subjects as "Capacity of Parties," "Formalities of Celebration," "Validity of Marriage of French Citizens Abroad," "Marriage of American Citizens in France," "Consequences of Marriage Under French Law," "Property as Affected by Marriage," "Separation and Divorce," etc., etc., also extracts from the French Civil Code bearing on Marriage and Divorce and an Appendix containing copies of many diplomatic documents from the archives of the American Legation.

The Works of James Wilson, Associate Justice of the Supreme Court of the United States and Professor of Law in the College of Philadelphia. Edited by James DeWitt Andrews, 2 vols. cloth. Price, \$7.00. Callaghan & Company, Chicago, 1896.

The production of the famous lectures of Professor Wilson is a real service to all those who are interested in the philosophical study of American institutions. The author was a profound student of political science and comparative jurisprudence and was distinguished as the member of the Constitutional Convention, most learned in the Civil Law. The lectures which form the greater part of these volumes were delivered to the students of the College of Philadelphia in 1790-92. The mind of a master is apparent throughout. He discusses and controverts the views expressed by European writers, notably Puffendorf and Blackstone, as to the nature of sovereignty and the origin of law, with a skill and logical force worthy of the subject and of the combatants. The theory of jurisprudence which underlies American law probably finds its best expression in these pages. The student of American political and legal history cannot well afford to neglect this book. It is impossible to read it without feeling a profound admiration for the character of the men who undertook and solved the problem of forming our national system, and for the qualities and training which they brought to their tremendous task. Mr. Andrews' preface, memoir, introduction, and notes are alike valuable and interesting.

A Treatise on the American Law of Attachment and Garnishment. By Roswell Shinn of the Chicago Bar. 2 vols. Sheep.

The scope of this work is broader than that of any modern work treating of the subject. The author has made a systematic arrangement of the subjects following their natural order, and by minute analysis of each subject treated of, has so expounded it that it is within the easy grasp of the reader. Every phase of the law of attachment and garnishment is set forth with a complete and accurate statement of its principles. The work is a general one calculated to supplement the statutes of every state, and it cannot fail to gain great popularity among the legal profession.

MAGAZINE NOTICES.

Albany Law Journal, 1896.

<i>Apr. 4.</i>	Execution of Foreign Judgments in England,	G. G. Phillimore
<i>Apr. 11.</i>	The Common Law of England,	<i>Law Times</i>
<i>Apr. 18.</i>	The Anglo-American Imbroglia,	E. H. Mounier
<i>Apr. 25.</i>	Sarah Austin—A Modern Theodora,	Sylvia R. Hershey
<i>May 2.</i>	Legatees Resident Abroad,	<i>Law Times</i>
<i>May 9.</i>	The Liquor Tax Act.	

Virginia Law Register, March, 1896.

The Judges Tucker of the Appeals of Virginia,	J. Randolph Tucker
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May, 1896.

Judge John Taylor Lomax,	L. S. Lewis
A Bit of Legal History,	H. R. Preston
Married Women,	W. F. Elliott

The Green Bag, May, 1896.

Nicholas Hill,	Hon. Matthew Hale
The Surratt Case Célebre,	A. Oakey Hall
The Supreme Court of Mexico,	Hon. Walter Clark
Legal Ethics,	W. E. Glanville
A Reform in Criminal Procedure,	Champion Bissell

Central Law Journal, 1896.

<i>Apr. 3.</i>	The Right of Stoppage in Transitu,	W. C. Rodgers
<i>Apr. 10.</i>	Books of Account as Evidence,	George Sawyer
<i>Apr. 17.</i>	Chemical Experts: A Trio of Important Factors in the Detection of Crime,	Percy Edwards
<i>Apr. 24.</i>	Vesting of Legacy—Presumed Assent of Executor.	William L. Murfree, Jr.
<i>May 1.</i>	Right to Publish Letters,	Frank Trenholm
<i>May 8.</i>	Evidence Illegally Obtained,	J. H. Ramage

YALE LAW JOURNAL

VOL. V

JUNE, 1896

No. 6

THE ORIGINALITY OF THE UNITED STATES CONSTITUTION.

The striking and now famous remark of Mr. Gladstone—"As the British Constitution is the most subtle organism which has ever proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man,"—has given good cause for much discussion. Our most recent constitutional commentator has expressed himself on this point thus: "It was well said by Gladstone that 'the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man.' Sciolists and bookworms have sneered at the phrase as overlooking the indebtedness of the Federal Convention to the teachings of history. But the great statesman of our own time well appreciated the value and the character of the work of the statesmen of the eighteenth century. Their product was new, if anything can be new, unless we destroy the word and adopt the hyperbole of Solomon. The result was as much an invention as were the first cotton-gin and telephone."¹ A reviewer of the work of this commentator has also written with special dogmatic energy, "As a whole the Constitution is just what Gladstone called it—'the most wonderful work ever struck off at a given time by the brain and purpose of man.'"² We think, however, the prevailing view of Gladstone's remark among our jurists and scholars has been to the effect that it was quite wide of the mark, a hasty or superficial generalization, which the fame of its author has alone floated into the accept-

¹ Foster, Com. on Const. 1, Sec. 6.

² Prof. Henry Pratt Judson in Am. Hist. Rev., April, 1896.

ance of the uncritical or uninformed. The very emphatic opinions of the two authorities now mentioned make it possibly worth while to examine the point again.

Much depends in this case as in most cases on the meaning attached to words. If an agreed or true meaning can be found for the words used here by Mr. Gladstone, and if the same can be done for the language used by Messrs. Foster and Judson, as above quoted, much will have been done towards fair argument and correct conclusions.

Here, as is so often true, the language used is open to more than one interpretation. What does Mr. Gladstone mean by (1) "struck off"; (2) "at a given time"; (3) "by the brain and purpose of man?" The whole remark is rhetorically an antithesis; two contrasted ideas are set over against each other—the growth or method of the British Constitution, and the growth or method of the United States Constitution. The measure of one member of an antithesis may often be found in the other. The idea of the British Constitution, intended by the writer here, is an organism resulting from successive historical facts and influences. The contrast to this is the idea of the United States Constitution as a work done and completed at a single point, or within a narrow limit of time. The antithesis is clear—it is between a slow growth on the one hand and a quick manufacture on the other. The one Constitution is represented as resulting from a long train of events and forces, the other as created, "struck off," brought into being, at once, by the effort of a few men working to that end.

Mr. Foster's idea, if his language is faithful to his idea, is, or seems to be, that Mr. Gladstone had reference, in his description of the Constitution of the United States, to the mere combining of elements—principles, practices and methods—already known and developed, and as in a mechanical invention like the cotton-gin or the telephone, producing a general result properly called new, or in the phrase of the law, "novel." Manifestly Mr. Gladstone had no such notion in mind. His language will not suffer such a meaning. He meant, not that the so-called authors of our Constitution put together political principles and practices already tried and known or familiar, but that they originated political principles and practices or methods not before known or discovered. He meant this by his antithesis—the British Constitution the product not of individual men acting consciously to such end at a given time, but the product of impersonal forces moving forward in the manner of history to an observed result.

Under such a view his antithesis is as a mere piece of rhetoric quite faultless; but if he meant to contrast the processes and results of the impersonal forces of history with the processes and products of mechanical combinations and contrivances, resulting in what is known in patent law as "novelty," his antithesis loses its point and propriety.

What Mr. Gladstone says may, therefore, be correctly stated thus: The British Constitution is the slow result of historical forces and influences; the Constitution of the United States is the sudden result of the creative genius of our men of 1787. Perhaps Professor Judson had such a contrast in mind, but manifestly Mr. Foster had not. The latter's reference to the cotton-gin and the telephone shows quite another thought. Mr. Gladstone's thought is, not that those who drew the Constitution of 1789, were *rédacteurs*, but creators, discoverers, originators, whereas the British Constitution was not only unwritten, but, as it were, uncreated and unoriginated, save as a result of influences which no one man, or assembly or generation of men, had controlled or guided.

This statement or vindication of Mr. Gladstone's rhetorical attitude and real meaning has been necessary in order that we may see whether his view be accurate or superficial, illuminating or misleading. What we maintain, in opposition to Mr. Gladstone's notion, is that the Constitution of the United States is as truly the result of progressive history, as truly an organism proceeding from antecedent historical ideas and principles, as is the British Constitution; that the work of the authors of the Constitution of 1789, was not, by contrast, creative and original, but very strictly of a selecting, arranging, and combining nature—a really synthetical, and not an originating, work.

And we may say here, as well as later, that the work of the men of 1787 called for and showed wisdom, sagacity and prescience of an order as high as if they had set themselves to contrive and create new methods and principles of government. In truth, it showed far greater wisdom. On another occasion the present writer thus expressed his view of this point:

"The wisdom of the authors of the Constitution of 1789 lay, be it ever remembered, in following no fascinating theories of natural right and justice, nor brilliant philosophical speculations upon the nature of society and government, but in a profound knowledge and application of the familiar, home-bred, hard-won, slowly maturing results of the political life and experience of the American people as colonies and as States under the Confederation. The authors of our political and judicial systems wrought with materials furnished by that long, symmetrical, Providential training which, through a century and

a half of feeble and futile confederation had schooled them for their sublime task of preserving and perpetuating their local governments through familiar local agencies, and yet binding them all, by indivisible bonds, into one harmonious Plural Unit. Honored be their memories! Their abounding and unselfish patriotism; their grave and serene trust in their cause; their lofty and invincible faith in human nature; their brave and unshaken confidence in our capacity for self-government; but more than all, except their antique and severe public virtues, their simple reliance on what history and experience had taught them!"³

What, now, are the evidences which go to determine the issue we have above stated? Generally, they are the facts which support the general conclusion that all the methods and principles, with but one important exception, which were combined and wrought together into the Constitution of 1789, were well known and, we may fairly say, familiar, in theory and practice before 1787. The exception is the method provided in our Constitution for the election of President and Vice-President. It is even stated on good authority that "that was borrowed from the Constitution of Maryland, which provided a similar method for the election of its Senators."⁴ And it is a most significant and impressive fact that this exception is really the only feature of our Constitution which has become essentially a dead letter, the central idea of this provision having long ago been superseded in practice by a method directly opposite in its effects to the intended effects of the provision of the Constitution. The scheme of the Constitution, in this respect only, may have been an invention "as much as were the cotton-gin and the telephone," but for want of any roots in the past, as well as for want of harmony with democratic tendencies, it fell and passed into innocuous desuetude, while the other chief features of the Constitution, having "proceeded from progressive history," have lived and grown strong and stronger.

Perhaps before going farther it may be well to ask what is meant by the idea which is expressed by the phrase, "proceeded from progressive history." It is rather a misty and grandiose phrase, and in that respect quite characteristic of its author—resounding rather than accurate, rhetorical rather than carefully descriptive. Reduced to common speech, it seems to be intended and understood to exclude to some great degree and in some strict sense the idea of conscious aim or plan or agency of individual men or generations of individual men. It appears to

³ Const. Hist. as seen in Am. Law, 283 (Putnams, 1889).

⁴ Henry Wade Rogers, LL.D., in Const. Hist. as seen in Am. Law 9, citing 2 Pitkin's "Political and Civil History of the United States," 302.

be used to connote an order or evolution of results which is directed by higher powers than man's. We do not quarrel here with this abstract notion, but it does not appear how it can be truly applied to the British Constitution in any special sense. It would at times seem that those who use Gladstone's phrases, if not their author himself, conceive of history as some great irresistible force or current, like a pre-historic glacier, carrying in its mass huge boulders which it deposits here and there, which remain as landmarks and guides to succeeding generations of men. Some such vague conception seems to be in the minds of many when the discourse is of the British Constitution. It is far from the fact. The British Constitution has been the work of individual men, of separate human hands, of distinct generations of men—statesmen, rulers, philosophers, jurists—all real men whose personalities and names are known and registered. In no other sense is it an historical deposit like a glacial rock or collection of rocks, than that many of the men who wrought it out and fashioned it lived in far-back tracts of history and were representatives of long successive periods of time. The British Constitution is not written in one document; its text is nowhere accessible as a whole; its muniments and titles and documents, most of them, cannot be inspected in their original forms like enrolled Constitutions or legislative acts of the day, but this is the most superficial of differences. Progressive history, if it means more than the successive efforts and results of human agents largely self-directed to self-determined ends is a misleading and deceptive phrase, even when applied to the British Constitution.

Our thesis now is—that the separate features of the Constitution of the United States were well-known before 1787, and were in truth products of history, "proceeded," if one pleases so to call it, from "progressive history." The proper limits of this article will not permit much detail in confirmation of this view, but a little may well be said to that point.

Our federal Union is a union of individual States, each State a civil organism complete within itself, once sovereign and independent, and still an organism distinct from the Union or nation. The States existed before the Union and might and doubtless would exist as States after the Union should have passed away.⁴ From the States came the Union under the Constitution. The original, historic unit was the State—Massachu-

⁴ Chief-Justice Chase in *Lane Co. v. Oregon*, 7 Wall. 76, 78, and in *Texas v. White*, 7 Wall. 700, 725.

setts, Virginia, Connecticut, for example. Any adequate study of the origin of our Union and nation must begin with the States. The American State, Connecticut for instance, is as free and true a growth of history as England herself. She certainly was not "struck off, at a given time, by the brain or purpose of man." She was born and grew, and was not hand-made, or man-made, in any other sense than England was.

Out of States, thus organically produced, came the Union. The tendency and thought which pushed on all the efforts at a union of the colonies from 1735 to 1776, and finally resulted in the Union of 1789, was the same historical force which had, moving more slowly, made England, by successive steps out of the village-community, the hundred, and the shire. The attempts at Union in this country were not satisfactory till by a course of training and education—as truly historical, or "proceeding from progressive history," as any force that can be named—the people of the States, recognizing the necessity of a more perfect Union, rose to the great conception and work of our federal Union. Thus, the Union of 1789 is a strictly historical result. The manner and form of the Union are not less so. The men who sat in convention in 1787 did not contrive the union, nor did they contrive its form. These grew out of antecedent experiences of the people and took form from the same influences. The seed-thought of this Union is a power which can act and be empowered to act on the individual citizens, instead of the States as political corporations. Did Hamilton, or Madison contrive this idea or this Union? No more than Henry VIII. or Elizabeth contrived the consolidation of England. One may search the records of the Convention of 1787, nowhere to find any direct discussion of this idea. The idea was there before the Convention met. It demanded, through the people, simple recognition. It received recognition, and thus the Union became a fact.

The people, on the other hand, enured to local or self-government, by their constant experience as colonists, had come to associate their freedom with their local governments. Here again was the germ of the remarkable feature—the hiding-place of the strength of our system—which gave to the Union only such powers as were needed for certain clearly-defined ends, and retained all else for the original States or the people. Who of the men of 1787 contrived or "struck off" this idea? No man; because the idea was already born, already warm and fixed in the hearts and convictions of the people.

The great general features of the three departments of the government—legislative, executive and judicial—and the division of the legislative into two chambers, were in no sense new or untried or unfamiliar; they were the well-known features of most of the State governments. The national judiciary, especially the Supreme Court, is often remarked as peculiar, and Sir Henry Maine has called it, by overstatement, "a virtually unique creation of the founders of the Constitution,"⁶ but even this was only the application to the National government of a feature or method already familiar to the States before 1787. In 1787 eleven of the thirteen States had written constitutions, and courts were empowered to pass upon questions of the conformity of legislative enactments or executive acts, to the fundamental constitutions. Says an able writer recently: "Before the Federal Constitution was framed the constitutions of the several States had established supreme courts within their States, and those courts exercised the power of declaring legislative acts void, when in conflict with their respective constitutions, before ever the Supreme Court of the United States asserted a similar power in 1803, in the great case of *Marbury v. Madison*,"⁷ and this writer gives abundant historic evidences of the fact thus stated.⁸ This practice or principle was not known at that time in Europe, nor is it now. "In short," says the last-quoted authority, "there is not in Europe to this day a Court with authority to pass on the constitutionality of national laws."⁹ But in this country, as has been said, the idea and practice were well established in 1787.

The general constitution of the two houses of Congress was plainly after the models of the House of Lords and House of Commons in England, with only such changes as were already familiar in most of the States. The special basis of representation in the lower House—population—was in accordance with State practice, while equal representation in the Senate was but a concession to the smaller States, due to the exigencies of the occasion and in no sense a work of constructive ingenuity or wisdom. The great provision requiring all revenue bills to originate in the lower House is merely a copy of the hard-won right of the Commons of England.

It has been observed by many eminent writers on this sub-

⁶ Pop. Gov't, p. 217.

⁷ Cranch. 137.

⁸ Henry Wade Rogers, LL.D., in *Const. Hist.* as seen in *Am. Law*, 9, 10.

⁹ *Id.*, 11.

ject, that the United States Constitution is marked, as was no other Constitution before it, by a system and series of limitations of all the powers conferred by it. It is true. Our Constitution is unique in this respect among all national constitutions of the past or present, but is this feature an invention or creation of the men of 1787? Plainly not; the idea was already found in the State constitutions. The idea, too, was deeply wrought into the thought and purpose of the people of 1787, by their recent experience. The unlimited powers of Parliament and King in England had forced them into rebellion, and when their representatives sat down in the convention of 1787 to put into express form a constitution of government, no mandate of the people, no thought of the hour, was more imperative and controlling than that of excluding from every nook and corner of the constitution the idea or possibility of absolute power. Hence, the great series of limitations which creates so large a field of our constitutional law—constitutional limitations—is not an invention or thought of any member of the convention of 1787, but is in a special and eminent sense the result of history, of historical facts and influences which moved men in that convention, as it also then moved the whole people of the United States.

In this way we might go over each item of the Constitution, and the result would be in substance the same. The strength, the vitality, the permanence, the wisdom, and the glory of our chart of national government, lie in the fact that, not unlike the British Constitution, but strictly like it, it is in truth the expression of rules, methods, and principles developed by history, made familiar by long experience, and therefore suited to the wants and ways of the people. In our Constitution, as truly as in any human document or memorial, we see the results of history and the control of experience. It cannot be correctly described as "a work struck off at a given time by the brain and purpose of man," nor can it be contrasted with the British Constitution as being less the product of historical forces and influences.

THE KOWSHING, IN THE LIGHT OF INTERNATIONAL LAW.

In entering upon a discussion of this case the author of this thesis is not unaware of the presumption, arising out of his Japanese nationality, that his presentation of the facts and circumstances of the case may be lacking in impartiality. It is in view of this presumption that in the following statement of the case the author expressly refrains from making a single reference to the Japanese sources. From the reports¹ of the Captain and the chief officer of the *Kowshing* the following facts appear:

Nationality.—The *Kowshing* was a British steamer belonging to the Indo-Chinese Steam Navigation Co., an English corporation doing business in China.

Employment.—She was chartered by the Chinese Government to serve as a transport, and formed a part of the expedition of ten transports which carried troops from China to Korea. At the time she was sunk by the *Naniwa*, a Japanese man-of-war, she was actually engaged in carrying 1,100 Chinese soldiers, two Chinese generals, one European military director, a number of other officers, twelve guns, and rifles and ammunition proportionate to the number of soldiers.

Time and Place.—She was sighted by the *Naniwa* at about 9 A. M. on the 25th day of July, 1894, off the coast of Korea, and at about 2 P. M. she was finally sunk.

Circumstances.—The fact that the *Kowshing* was a British steamer was several times repeated to the Japanese, as was also the fact that at the time of her leaving port war had not been declared. In consequence of these remonstrances the *Naniwa* made many efforts to make the *Kowshing* follow her without the use of force. Failing in these peaceable efforts the *Naniwa* discharged a torpedo and also fired her guns, resulting in the sinking of the vessel.

The claim, made by the officers of the *Kowshing*, that at the time of her leaving port war had not been declared, was undoubtedly well-founded, but, at the same time, the important fact must not be lost sight of, that a state of war was actually existing at the time she was sighted. Witness the following

¹ Appendix A, Nos. 1 and 2.

extracts from Vladimir's¹ "China-Japan War": "On the 25th [July, 1894] at 7 A. M., when they [three Japanese men-of-war] were near the islands of Phung and Shapain, they met two Chinese men-of-war—the *Tsi-yuen* and the *Kwang-yi*. * * * The action was short and decisive. In about an hour the *Kwang-yi* was crippled, and had to be run into shallow water. The *Tsi-yuen* had her bow gun disabled, twenty of the crew were killed, etc., etc." Thus it appears that only a few hours before the *Kowshing* was sighted an actual war had broken out. The first question, then, of international law is: Did Japan act within the rules of international law in commencing a war without a formal declaration?

Roman Practice.—It is often asserted that the Romans never commenced a war without making a formal declaration, but no less a man than Lord Hale is the authority for saying that even with them the ceremony was frequently dispensed with, when, *e. g.*, delay might occasion surprisal or irreparable damage to the Commonwealth; as when the adverse party made preparation, which if not suddenly repressed, might prove more dangerous and irresistible. Commenting upon this Robert Ward, the historian of international law, says: "The soundness of this opinion depends upon no deep founded reasoning, no abstract propositions, no ingenious niceties. It is graven in the common sense, in the very instincts of mankind. For who, having proof that another had resolved to attack him in arms, and seeing him approach with arms in his hands, would not instantly disable him if he could, before his design was executed? Who that is told that another is seeking a sword to aim at his breast, will not be beforehand if he can, and seize the sword himself? In civil society, where threats of violence are used by an enemy, we have a right to demand security, and the judge must award it. Out of society there is no judge, and the man of nature is left to discretion. It is needless to remark that States, in this respect, are out of society."²

Modern Practice.—It will not be denied that it lies at the very conception of international law that it is a body of rules and practices set up by the civilized nations of the world, of their own free will and accord. What, then, has been the practice of modern civilized nations regarding this point?

¹ Vladimir is an Englishman who was connected with a diplomatic mission to Korea, and who, on account of his official position, prefers to write under this assumed name.

² Ward's "Enquiry."

Woolsey says that "the number of wars without declaration within the last three centuries is quite considerable," and, by way of illustration, mentions the war of Spain with the United Provinces, and that of Gustavus Adolphus with the Emperor Ferdinand II., as having been waged without being preceded by any formal declaration. Kent gives the following as instances in which no declaration preceded, viz.: 1. The war of 1756, between England and France; 2. The war of 1778, between England and France; 3. The war of 1793 between England and France; 4. The war of 1803, between England and France; 5. The war of 1812, between United States and England. Nor do the foregoing exhaust the list. Louis XIV. commenced the war of 1688 without making any formal declaration, and it was after he had marched to the Rhine, invested all, captured some, of the fortresses of the Palatine, that he published his manifesto of war. The war of the Spanish Succession was carried on for many months without any declaration. The bloody battle of Chiari, September 1, 1701, was fought nine months before declaration on one side and nearly a year on the other. The entire destruction by the English of the Spanish fleet at Passaro, August 11, 1718, took place without any formal declaration and was justified by England on the ground that the delay necessarily caused by such declaration would have enabled Spain to destroy the ally whom the English fleet was sent to protect. The war between France and Mexico in 1838 was begun by France instituting a blockade which Mexico considered an act of hostility. The war between the United States and Mexico in 1846 was begun without either notice or manifesto. These examples, which by no means exhaust the list, are sufficient to show that the uniform practice of modern nations has been to disregard the ancient custom of making a formal declaration before commencing hostilities. The explanation of this disuse is to be found, as suggested by Woolsey, in "the publicity and circulation of intelligence peculiar to modern times."

Authorities.—Passing from single instances of practice to conclusions reached by the writers on International law, it is found that there is a substantial agreement amongst them that a previous declaration is not necessary. Woolsey holds that war between independent sovereignties ought to be an avowed open way of obtaining justice, and reasons thus: "For every state has a right to know what its relations are towards those with whom it has been on terms of amity, etc., etc. It is necessary, therefore, that some act show in a way not to be mistaken that

a new state of things, a state of war, has begun."⁴ It is evident from this reasoning of this great American publicist that the expression "an avowed open way" is here intended to have a broad meaning, including not only a formal declaration but also any communication that notifies the other state, in terms not to be misunderstood, that the amicable relation hitherto existing is at an end.

Phillimore goes farther than this. Shortly stated, his position is that it is sufficient if one state lets the other understand its belligerent intentions, no matter in what form it is done. Witness the following passage: "For what does the reason of the thing require as a preliminary to actual war? Not that the party compelled to seek redress should afford his enemy, the wrong-doer, an opportunity of strengthening himself in his injustice, and even taking the other supposition, that both parties conceived themselves to be fully in the right, no analogy of private jurisprudence suggests that the one party should concede to the other any advantage in the law suit, whether it be that of evading the tribunal or of mending his case; the truth is, that good faith and the general interest of the Society of States require that when one member of it is about to exchange friendly for belligerent relations with another, he should not do so until fair and reasonable notice of his relations has been communicated. The channel of communication is, after all, of little importance, whether it be through a demand accompanied by a direct intimation that upon its refusal recourse would be had to war; or whether that intimation may be indirectly suggested by the nature of the demand itself, and the surrounding circumstances of the case, among which circumstances considerable weight must be ascribed to the withdrawal of the ambassador."⁵

Bynkershoek, who devotes a whole chapter to the subject of Declaration, is conceded to be by far the greatest authority on the subject. It is, therefore, interesting to see that he holds that declaration is unnecessary; that a war may begin by mutual hostilities as well as by a declaration; that it is evident, that where there is no judge between the parties, as is the case with princes, everyone may retake that which belongs to him; that this being the case, everyone is at liberty to make or not, as he pleases, a declaration of war; that reason alone is the soul of the law of nations, and that taking reason for guide no argument can be found to prove the necessity of declaration, but many on

⁴ Woolsey's "Introduction."

⁵ Phillimore's *International Law*, Vol. III.

the contrary, to show that it is not necessary (Bynkershoek's Treatise on the Law of War, Chapter II.).

Lord Hale, the expositor of the Public Law of England, states that, according to that law, "A general war is of two kinds: 1. *Bellum solemnitur denuntiatur*; or 2, *Bellum non solemnitur denuntiatur*; the former sort of war is, when war is solemnly declared or proclaimed by one King against another Prince or state, etc., etc. * * * A war that is non solemnitur denuntiatur is, when two nations slip suddenly into a war without any solemnity, and this ordinarily happeneth among us; the Dutch war was a real war, and yet it began barely upon general letters of marque; again, if a foreign Prince invades our coasts or sets upon the King's navy at sea, hereupon a real, tho' not a solemn war may and hath formerly arisen, and therefore to prove a nation to be in enmity to England, or to prove a person to be an alien enemy, there is no necessity of showing any war proclaimed, but it may be averred, and so put upon trial by the country, whether there was a war or not, etc., etc."

Hall, the English lawyer and publicist, whose recent death was lamented as a great loss to England and to the world, in his work on International Law takes the position that any sort of previous declaration is an empty formality unless an enemy must be given time and opportunity to put himself in a state of defense, conceding, of course, that no one has yet asserted such quixotism to be obligatory. After reviewing many authorities and precedents he concludes, that, when possible, some notice ought to be issued, for the convenience of neutrals, before commencing hostilities; that this cannot always be insisted upon inasmuch as there are cases when action, for example, on conditional orders to a general or admiral, takes place under such circumstances that a manifesto cannot be previously published (Hall, 315-322).

Vattel is often cited as an authority for insisting on Declaration before hostility, but even he, in so many words, says, that where delay would give the enemy time to prepare for defense, declaration may be dispensed with; that before declaration the enemy's frontiers may be reached, nay, his territory be entered and even his advantageous stations be occupied. Witness the following: "The law of nations does not impose the obligation of declaring war, for giving the enemy time to prepare itself for an unjust defense. The declaration need not be made till the army has reached the frontiers; it is even lawful to delay it till

* Hale's Pleas of the Crown.

we have entered the enemy's territory, and occupied an advantageous station; yet it must always precede the commission of any hostility.'"

It is probable that the last clause above cited is construed to mean that a formal declaration must always precede war. But one who reads that clause with any degree of care can not fail to discover that it means no more than this—that even at that moment when you have occupied the enemy's advantageous positions and are ready to charge upon him, you must not forget what you are about; that even at that moment, if the enemy is willing to comply with your demands, you must refrain from fighting him; that to this end you must precede your hostile acts with a formal declaration, for you cannot tell but that that last moment may awaken your enemy to his sense. But if it does not, then you may charge upon him at once. Thus Vattel's position is defeated by his own reasoning; for what is the use of a declaration if you can be fighting your enemy at the same instant with it? Moreover, is it not always understood that the invading state must stop as soon as the offending state submits? The practical result of Vattel's reasoning also is that war may be waged without being preceded by a formal declaration.

But it is from Hugo Grotius that Vattel, Puffendorf and the rest who insist on Formal Declaration derive their authority. Hence it is that we must look to him for the true reason of what he and his disciples contend for. "The true reason is," says Grotius, "that the war might appear for certain to be the act of the people, or the rulers of the people, since there are peculiar rights of war, which have not place in hostilities against robbers, or revolted subjects." In other words, Grotius calls for undoubted evidence that the war proceeds from a sovereign power. That this condition is met when one government publishes a declaration against another, is not denied. But this is merely one mode of proof. There is at least one other mode of proof. This is when the Foreign Minister of one court and the Ambassador of another carry on a series of negotiations, which is finally brought to an unsatisfactory termination. That such was the case with the relations between Japan and China will be seen by referring to the nine official documents published by the Japanese Government.* Before concluding this review of the authorities, another reference may be made to the eminent English

* Vattel's International Law.

* Appendix B.

author, the historian of International law, to whom reference has already been made. The following two propositions are laid down by him as the result of the soundest opinions on the duty of nations about to assume the character of enemies:

I. When there are differences between states which cannot be composed, the sword shall not be drawn unless justice has been demanded and refused, or delayed so as to amount to a refusal, and unless there is a reasonable understanding between the parties, of the consequences of such refusal; but

II. The above proposition *cannot apply wherever an adversary, by threatening attitudes and dangerous provisions of hostilities, the causes of which he will not satisfactorily explain, has rendered the duties it contains unnecessary.*^{*}

The result of the foregoing review of precedents and authorities may be summarized as follows:

Declaration is a custom which has come down from one or two nations of antiquity—particularly the Romans. But the Romans themselves did not observe the custom when the principle of self-preservation was involved, as, for instance, when the enemy was getting ready for an attack and the delay caused by a declaration would have enabled him to do irreparable damage.

The modern nations of Europe, who have adopted many of the laws and customs of the Romans, and who for a long time had considered this particular custom of declaration as binding upon them simply for the reason that it had come from the Romans with other customs, have at last concluded that this is a custom altogether too antiquated for these modern times, and their almost uniform practice for the last two hundred years or so has been to disregard this custom of making a formal previous declaration.

All the writers consulted, except one, are agreed that the intention of belligerency must be communicated in some way. The only point on which they differ or can be said to differ is the form that the notice of belligerency should assume. Woolsey does not say what form it should assume, but rather intimates that any act is sufficient if it shows unmistakably the intention of belligerency. Phillimore expressly states that form is immaterial. Bynkershoek totally denies the necessity of a declaration. Lord Hale states that the Public law of England recognizes such a thing as a war without declaration. Hall characterizes a declaration as an empty formality. Vattel and Grotius, while insisting on a previous declaration, reduce their position to

^{*} Ward's "Essays."

a mere nothing, the one by admitting that the ceremony may be immediately followed by hostilities, the other by saying that it is for no other purpose than evidence. Ward calls for a reasonable understanding between the parties as to the consequences of their disagreement, but he says that this duty is made unnecessary if the opposite party is already making warlike preparations the cause of which he will not explain.

Coming back to the question, "Did Japan act within the rules of International Law in commencing a war without a formal declaration?" the Romans would seem to say, "Yes; under some circumstances we have done so." The modern nations of Europe would seem to say, "Yes; that has been our uniform practice for over two hundred years." Bynherhoeck, Hale, and Hall would seem to say, "Yes," absolutely. Vattel would seem to say, "Yes," in substance. Woolsey, Phillimore and Ward would seem to say, "Yes," with the proviso that the opposite party was sufficiently informed as to what the consequences of disagreement would be. To this Ward would seem to add, "This proviso, however, does not apply where the opposite party is already making warlike preparations against you." Grotius also would seem to say, "Yes," with the proviso that the opposite party had sufficient evidence that the war proceeded from Sovereignty.

The application of these principles to the case in question requires an examination fuller than that already made into the relations existing between Japan and China up to, and, at the time in question—namely, the morning of July 25th, 1894. It being the aim of the author that no *ex parte* account of facts shall be allowed to get into this thesis, he has elsewhere¹⁰ appended the full text of the nine diplomatic documents that passed between Japan and China immediately preceding the outbreak of the war. As giving light on these documents it may also be well to recall at this point the provisions of the well-known Tien-tsin Treaty of 1885. It provided:

1. That the troops of Japan and China then in Korea should be withdrawn immediately.
2. That no more officers should be sent to Korea for military instruction by either Japan or China.
3. That if in future any disturbance of a grave nature should occur in Korea, necessitating the respective countries or either of them sending troops there, they should give each to the other previous notice in writing of their intention so to do, and after

¹⁰Appendix B.

the matter is settled they should withdraw their troops and not further station them there.

It is now proposed to examine the nine diplomatic documents above referred to.

No. I. is a strangely inconsistent document. With legal precision it states the reason why the notice is sent to Japan—that it is because by virtue of the Treaty of 1885 Japan and China stand on precisely the same footing in regard to their rights in Korea. Towards the close, however, it vaguely hints that Korea is a tributary state of China, by declaring that the sending of troops to Korea is in harmony with China's constant practice to protect her tributary states by sending troops to assist them. In No. II., dated the same day, Japan makes a prompt and explicit denial of this vague claim. In No. III., also dated the same day, Japan gives notice to China, that if China avails herself of her rights under the Treaty of 1885, Japan also intends to do the same. In No. IV. China makes another vague claim that Korea is her tributary state. She also declares that the sole object of her sending troops to Korea is the suppression of the Korean insurgents. (The importance of remembering this point will appear later.) She attempts also to limit the number of the Japanese troops, and to restrict their movements, in Korea. In No. V. Japan makes another plain denial that Korea is a tributary state of China. She declares also that she will use her own judgment in the exercise of her legitimate rights.

With No. VI. the correspondence assumes a new phase—Japan proposes the coöperation of the two countries, (1) in the suppression of the Korean insurgents, and (2) in the improvement of the Korean administration. No one who recalls the series of events that led to the conclusion of the Tientsin Treaty in 1885, can doubt the reasonableness of this proposal. China herself does not deny its reasonableness. She takes five days to find an excuse. At last she sends her reply. In this reply (No. VII.) she declares that the insurgents have already been suppressed and there is no necessity for the co-operation of the troops of the two countries in this matter; she rejects Japan's idea of instituting administrative reforms in Korea; she reminds Japan that in consequence of the suppression of the insurgents and by virtue of the binding force of the Tientsin Treaty the Japanese troops must be withdrawn at once; but she is silent as to the withdrawal of her own troops from Korea or as to the binding force of that treaty on herself.

In No. VIII. Japan disagrees with China, and declares that she will not withdraw her troops unless she is guaranteed that the insurgents have been fully suppressed and the cause of trouble eradicated. This disagreement is virtually the end of the series of negotiations. Between this document and the next there is an interval of twenty-three days, during which, it may be fairly inferred from No. IX., China persistently insists upon the withdrawal of the Japanese troops from Korea but does not withdraw her own. At last Japan sends the last of all communication from either side. In No. IX. Japan sets forth the unsatisfactory outcome of the negotiations and concludes that "the only conclusion deducible from these circumstances is that the Chinese Government are disposed to precipitate complications, and in this juncture the Imperial Japanese Government find themselves relieved of all responsibility for any eventuality that may, in future, arise out of the situation."

The foregoing examination of these documents shows—that China admitted that she stood on precisely the same footing with Japan in regard to her rights in Korea; that it was only in case a disturbance of a grave nature existed in Korea that she could send her troops there; that such disturbance did exist; that therefore she had sent her troops for the sole purpose of suppressing it. That Japan, upon receipt of China's notice, took no time in despatching her own troops to Korea, unwilling that the sad event of 1884 should be repeated; that she then proposed that Japan and China should unite in suppressing the insurgents and reforming the administration. That China rejected these proposals, and in so doing represented that the insurgents had been suppressed and demanded that Japan should withdraw her troops, at the same time keeping her own troops in Korea, notwithstanding her previous declaration that the sole object of the presence of her troops in Korea was the suppression of the insurgents. That Japan disagreed with China, refused to believe China's representation as long as it was contradicted by the latter's own conduct in not withdrawing the Chinese troops, and resolutely refused to withdraw her troops. That after this disagreement China again demanded, and Japan again refused, the withdrawal of the Japanese troops. That at last Japan gave notice to China that her conduct in rejecting Japan's proposals, and in demanding the withdrawal of the Japanese troops, without at the same time withdrawing her own, was such that Japan did not hesitate to suspect a disposition on the part of China to precipitate complications, and warned her, as plainly as diplo-

matic politeness would permit, that any further act in the same line would be met as an act of belligerency.

It was when matters stood at this stage that hostilities were commenced on July 25th, 1894, one of the incidents of which was the sinking of the *Kowshing*. Would not Woolsey, Phillimore, Ward and even Vattel, unite in saying that China was sufficiently informed as to what the consequences of despatching more troops to Korea (and be it always remembered that the *Kowshing* was carrying more than 1,100 soldiers to Korea) would be? Bearing in mind the warning given by Japan's Minister of Foreign Affairs, would not Grotius hold that China had sufficient evidence that the war proceeded from the Sovereign Power of Japan? Judging from their precedents, would not any nation of Europe have done the same under similar circumstances? Besides, even supposing for the sake of the argument, that China had no notice of Japan's intention, the *Kowshing*, with her cargo of officers, soldiers, and ammunition, would, if allowed to proceed, have enabled China to reënforce her forces in Korea to such an extent that she would have had little difficulty in driving all Japanese out of Korea. Was not this a case to which the second proposition of Ward applies? that notice need not be given where the opposite party is already making warlike preparations against you. Under such circumstances would not even the Romans have dispensed with the ceremony of declaration? China had officially declared that her sole purpose in sending troops to Korea was to suppress the insurgents. She had also officially declared that the disturbance no longer existed. She had also been officially warned that if, under the circumstances, she sent any more troops, Japan would regard the act as a belligerent one. Yet she refused to heed the warning. She sent more troops. She sent them for the unmistakable purpose of fighting Japan. Under these circumstances it will not be denied that Japan was acting within the rules of International Law in commencing hostilities in advance of a formal declaration.

But it is asserted that the *Kowshing* was a neutral vessel, entitled to the rights of a neutral, and, therefore, the sinking of her by the Japanese man-of-war was a gross violation of International law. The following is quoted from the *Law Review and Magazine* (London) as giving the strongest statement of that side: "The further question arises as to whether the action of the Japanese was not, in the absence of any intimation of a state of hostilities, a gross violation of neutral rights. It is quite clear in

these days that, as between the contending parties themselves, no formal declaration of war is necessary. As regards third parties, however, it is a well supported and altogether reasonable view that either some sort of clear notice should be given, in order to throw upon them the duties of neutrality; or at any rate that there should be proof that the existence of war *de facto* was so public and notorious as to be in fact known to the neutral. * * * To admit otherwise is to admit the extraordinary principle that a war between A and B may be legitimately commenced and declared by a sudden attack on C's property, in which A has a slight interest. But even apart from this fundamental violation of International Law, it was clearly the duty of the Japanese, under any circumstances, to conduct the *Kowshing* to the nearest Japanese port for adjudication by a Court of Prize. If such a taking of the *Kowshing* into a Japanese port was rendered impossible, owing to the opposition of the Chinese troops on board, the ship should have been captured in the usual way. It seems absurd to suppose that a fully-equipped man-of-war, with available consorts to support her, could not have taken possession of an unarmed merchant vessel without summarily blowing her out of the water" (by J. M. Gover, LL.D., editor Department International Law).

Thus Mr. Gover maintains that a neutral is entitled to notice before he can be charged with the duties of a neutral. But, as his countryman, Hall, says, this rule is at best a rule of convenience. Admitting, for the sake of the argument, that this rule of convenience applies in all cases, it is submitted that in the particular case under consideration there was a sufficient notice in the very nature of the transaction, which, on the part of the vessel, was nothing less than an undertaking to form a part of China's hostile expedition against Japan. The Japanese Commander did not act on "the extraordinary principle that a war between A and B may be legitimately commenced by a sudden attack on C's property, in which A has a slight interest." On the contrary, he acted on the very ordinary principle of self-preservation that in a war between A and B, C must not be permitted to resort to the mean trick of assisting A without divesting himself of his neutral rights. It shocks any ordinary man's conscience and utterly confounds his common sense to be told that in a war between A and B, C may come in and materially assist A against B and, when caught by B in that very act, claim to be absolved from all responsibility because he had all the while been flying his neutral flag. It is against this very abuse of neu-

trality and prostitution of neutral flag that Mr. Gover's own country has always protested in her wars with other nations. Mr. Gover thinks that if the opposition of the Chinese troops on board was such that it was impossible for the Japanese to take the *Kowshing* into the nearest Japanese port for adjudication, she "should have been captured in the usual way." What he means by "the usual way" it is difficult to know. From the context it would seem that he means that the officers and mariners of the Japanese man-of-war ought to have put the Chinese officers and soldiers under chains. But he ought to remember that the crew of the Japanese man-of-war did not at most exceed four hundred, whereas the *Kowshing* carried nearly twelve hundred armed officers and soldiers. He also thinks it absurd that a man-of-war could not have taken possession of a transport without blowing her out of the water. This sort of argument is, to say the least, misleading. It proceeds on the assumption that a man-of-war is superior in strength to a transport, and also on the assumption that the opposite party is sufficiently intelligent to know this superiority and wherein it consists. Now, it is a fact beyond all question, as appears from the official reports" elsewhere appended, that the Chinese on board the *Kowshing* were absolutely ignorant as to the superior strength of the man-of-war over the transport, and repeatedly declared to the captain and other officers of the *Kowshing* that they were ready to fight with the Japanese. It is very probable that Mr. Gover based his argument upon the false assumption that those Chinese were as intelligent a set of men as himself. Hence, his argument fails. The foregoing quotation from no less a source than the editor of the Department of International Law of a leading English law review, shows how easy it is for one to have Reason overpowered by Sentiment. It has been seen elsewhere that the *Kowshing* was a part of a fleet of ten transports,¹¹ carrying in all an extraordinarily large number of troops from China to Korea, and was herself actually carrying about twelve hundred Chinese soldiers. The next question of international law, therefore, is:

Did the Japanese Commander act within the rules of International Law in destroying a neutral vessel in the transport service of the enemy and forming a part of his hostile expedition?

Authorities.—Woolsey says that "the conveyance of troops for a belligerent has long been regarded as highly criminal," and mentions many treaties in which exceptions are made

¹¹ Appendix A., Nos. 1 and 2.

¹² Chief Officer Tamplin's Report.

against free ships when they carry military persons. He says troops "are something more than contraband, as connecting the neutral more closely with the enemy," and reasons that if the obligations of neutrality forbid the conveyance of contraband goods to the enemy, still more do they forbid the neutral to forward the enemy's troops. For "a contraband trade may be only a continuation of one which was legitimate in peace, but it will rarely happen that a neutral undertakes in time of peace to send troops of war to another nation." As showing the rigor of the English courts on this subject, he cites a modern case, in which a Bremen ship was condemned during the Crimean War, by a prize court at Hong Kong, for carrying two hundred and seventy ship-wrecked Russian officers and seamen from a Japanese to a Russian port.

Phillimore is no less clear than Woolsey, as appears from the following: "As to the carrying of military persons in the employ of a belligerent, or being in any way engaged in his transport service, it has been most solemnly decided by the Tribunals of International Law, both in England and the United States of North America, that these are acts of hostility on the part of the neutral which subject the vehicle in which the persons are conveyed to confiscation at the hands of the belligerent. * * * It has been justly holden that a ship so employed cannot escape confiscation by alleging that she acted under duress and violence. If an act of force, exercised by one belligerent power on a neutral ship or person, were to be deemed as sufficient justification for any act done by him contrary to the known duties of a neutral character, the rights of the belligerent and the rules of international law would be easily evaded and set at naught. The neutral must look to his own Government for redress against the Government which has coerced him. Moreover, the penal liability of the ship so employed is not extinguished until the vessel has shaken off the belligerent character which her occupation has impressed upon her. So long as she continues under the command of the enemy she remains liable to capture and condemnation."

Wheaton evidently does not wish to say what his countryman Woolsey plainly says, that military persons are something more than contraband articles. He admits, however, that they are analogous to contraband goods, and expresses himself thus: "A neutral vessel which is used as a transport for the enemy's forces is subject to confiscation, if captured by the opposite

belligerent. Nor will the fact of her having been impressed by violence into the enemy's service, exempt her."¹³

Hall, in his usual cautious, yet luminous, style, says: "A neutral vessel becomes liable to the penalty appropriate to the carriage of persons in the service of a belligerent, either when the latter has so hired it that it has become a transport in his service and that he has entire control over it, or when the persons on board are such in number, importance, or distinction, and at the same time the circumstances of their reception are such as to create a reasonable presumption that the owner or his agent intend to aid the belligerent in his war." Opinions to the same effect might be added almost indefinitely, but enough have been quoted to show that there is a remarkable unanimity among the authorities in holding that a neutral vessel cannot enter the transport service of one belligerent without at the same time making herself liable to the other. Nor are these opinions unsupported by adjudged cases. It is now proposed to examine these cases.

Adjudications:

The *Eliza Anne* was the case of an American ship laden with hemp, iron, and other articles, seized by the English within the territorial jurisdiction of Sweden, upon the outbreak of the war of 1812, and brought in for adjudication in the High Court of Admiralty of England. Among other things, the Court said: "The high privileges of a neutral are forfeited by the abandonment of that perfect indifference between the contending parties in which the essence of neutrality consists. * * * A war may exist without declaration on either side."¹⁴

The *Orosemba* was an American ship ostensibly chartered by a merchant in Lisbon (a neutral port) to proceed to Macao (also a neutral port), carrying on board three officers of distinction in the Dutch army, whose real intention was to reach Batavia (a Dutch colony). The claimant contended that with respect to the secret destination and intention of particular persons on board, in the character of passengers, it was impossible for the master to conjecture, much less to know, the purposes for which they were going, beyond what they might think proper to disclose, that the ship's undertaking was a transaction of a commercial nature in its principal features; that the military persons were few in number, not taken on board in their military character, and destined, on this immediate voyage, to a neutral

¹³ Wheaton's International Law.

¹⁴ 1 Dodson's Admiralty Rep. 247.

country. But the court held: That a vessel hired by the enemy for the conveyance of military persons is to be considered as a transport, subject to condemnation; that number alone is an insignificant circumstance in the considerations on which the principle of law on this subject is built, since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition, and that the master's ignorance of the character of the service on which he was engaged could afford no ground of exculpation in favor of the owner.¹⁵

The *Friendship* was an American vessel apparently engaged in commerce, carrying thirty tons of fustic and forty-four hundred and fourteen hogsheads staves, but also carrying ninety passengers who were French mariners. After stating the suspicious circumstances of the case the English High Court of Admiralty said: "Under these circumstances I [Sir W. Scott] am of opinion, that this vessel is to be considered as a French transport. * * * What are arms and ammunition in comparison with men, who may be going to be conveyed, perhaps, to renew their activity on our shores? They are persons in a military capacity, who could not have made their escape in a vessel of their own country. Can it be allowed that neutral vessels shall be at liberty to step in and make themselves a vehicle for the liberation of such persons, whom the chance of war has made, in some measure, prisoners in a distant part of their own colonies in the West Indies? * * * I do with perfect satisfaction of mind, pronounce this to be a case of a ship engaged in a cause of trade, which cannot be considered to be permitted to neutral vessels, and without hesitation, pronounce this vessel subject to condemnation."¹⁶

The *Carolina* was a Swedish ship, which had served in the French expedition to Alexandria, as a transport to convey French troops. At the taking of Alexandria by the English this vessel was captured, but, before she had been brought to adjudication and while in the possession of the captors, she was lost. The case was heard in the English High Court of Admiralty, on a petition by the master that the captors be made answerable to him for the loss. It was contended on his part that he was an involuntary agent in the transaction, the French having compelled him, under an act of duress, to submit the vessel to their service. On this point the Court said: "If an act of force,

¹⁵ The *Orozembo*, 6 Robinson's Admiralty Report 433.

¹⁶ The *Friendship*, 6 Rob. 422.

exercised by one belligerent on a neutral ship or person, is to be deemed a sufficient justification for any act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demand must seek redress against the Government that imposed the restraint upon him. * * * Whether the troops were received on board voluntarily or involuntarily could make no difference.'"

It was also contended on the master's part that it was an additional circumstance to be urged against the captors, as a reason why the loss should fall on them, that they stripped the vessel of her crew, and put other hands on board, and did not proceed to bring the vessel to adjudication immediately. On this point the Court said: "It must be conceded that commanders acting in the management of great expeditions cannot be tied down exactly to the same rules, by which individual cruisers are directed to proceed.'" The principles set forth in the foregoing cases have been adopted by the Supreme Court of the United States, in many cases.

In the case of the *Commercen*, a Swedish vessel, captured by an American armed schooner, Mr. Justice Story said: "It has been solemnly adjudged that being engaged in the transport service of the enemy, or in the conveyance of military persons in his employ, are acts of hostility which subject the property to confiscation. * * * The principle of these determinations was asserted to be that the party must be deemed to place himself in the service of the hostile state, and assist in warding off the pressure of the war, or in favoring its offensive projects."

In the case of *The Nereide*, a neutral vessel carrying enemy's cargo and sailing under neutral convoy, Mr. Justice Story said: "It is a clear maxim of international law that a neutral is bound to a perfect impartiality as to all the belligerents. If he incorporates himself into the measure or policy of either, if he become auxiliary to the enterprises or acts of either, he forfeits his neutral character. * * * The act of sailing under belligerent or neutral convoy is of itself a violation of neutrality, and the ship and cargo if caught *in delicto* are justly confiscable, etc., etc."

The foregoing examination of the opinions of the most emi-

¹⁷ The *Carolina*, 4 Rob. 256.

¹⁸ The *Carolina*, 4 Rob. 256.

nent publicists and also of regularly adjudged cases, establishes the following:

That a neutral who would claim the benefit of his neutral character must act with perfect impartiality toward both the belligerent parties; that the conveyance of a certain class of articles for the benefit of one belligerent is such an offense as to forfeit his neutral character; that it is a much more serious offense, nay, "a highly criminal" conduct, for a neutral to engage in the transportation of troops; that if caught in the act, it is of no avail to the neutral to plead that he was acting under duress or was ignorant of the purpose of the belligerent whom he was serving; that if a neutral vessel, caught in the act of such hostile service, is lost while in the possession of the captors, the owner of such vessel can obtain no relief from *the belligerent whom he has been wronging*; that this is so even where it can be charged against the captors that they did not proceed to adjudication immediately; that this rule is founded upon the ground that the commander of a fleet has the discretionary power to decide for himself whether he shall attend to the interest of a wrongful neutral vessel first or postpone it till the greater interest of his own fleet has been attended to.

Applying these principles to the case under consideration, it cannot be denied that the *Kowshing* was a neutral vessel that had forfeited all her neutral rights by having acted contrary to the fundamental rules of the Law of Nations. She was a neutral vessel identified with the enemy, and as such she was no more entitled to protection than an enemy's vessel. If she had been caught singly while engaged in the ordinary duties of a transport, she could and should have been brought in for adjudication by a Japanese Court of Prizes. Even in that case, however, the Japanese commander would not have been bound to have brought her in immediately, but he could have attended to his more important duties. If, in the meantime, the vessel, after being stripped of its crew, should have been lost, the Japanese commander would not have been liable to the owner for the loss. If, as was the fact, the *Kowshing* was a part of a hostile expedition, her flying the British flag could have made no difference and the Japanese were entitled to prevent her by all means from reaching her destination. If, as was the fact, the number of Chinese soldiers on board was such as to greatly outnumber the Japanese; if, as was the fact, the Chinese soldiers on board of her were such an ignorant set of men as not to believe, though told, that, however large their own number, the mechan-

ical superiority of a man-of-war over an unarmed transport was such, that they were completely in the hands of the Japanese, and if, as was the fact, owing to these circumstances, it was absolutely impossible for the Japanese commander to prevent these Chinese from reaching their destination (to the great disadvantage and perhaps utter defeat of the Japanese in Korea) without destroying a vessel, which, by reason of having acted contrary to the Law of Nations, had made itself confiscable to the Japanese; it cannot be denied that the Japanese commander was acting within the rules of international law, when he threatened the *Kowshing* with destruction in case of disobedience to his orders and did destroy her in consequence of such disobedience. It is alleged that at the time of her leaving port the *Kowshing* was without notice. But, was she not chartered by a military commission of the Chinese Government and placed under its sole control? Do not the reports of her master and chief officer show that they knew that she was a part of a fleet of ten vessels, chartered by the Chinese Government for the purpose of conveying reinforcements to the Chinese forces in Korea? Was she not caught in the very act of carrying a part of these reinforcements? In the face of these circumstances, can it be said that she was without any notice whatever? It may be contended that these circumstances merely constituted a case of presumptive notice. Be it as it may, at any rate the *Kowshing* had actual notice of the existence of a war, from the moment when she received the orders of the Japanese commander. If after receiving such orders accompanied by a due warning, she did not obey them, it can not be complained that the Japanese commander did execute his orders by means of force, the only alternative possible under the circumstances. It is also alleged that in disobeying the orders of the Japanese commander the officers of the *Kowshing* were acting under duress of the Chinese generals on board, but that such defenses do not avail in case of this kind has too often been decided to need any discussion at this point (*The Carolina*, ante.).

In conclusion the author ventures to hope, that, imperfect as this inquiry has been, the intrinsic nature of the case is such that he has not been altogether unsuccessful in showing that the many charges made against the so-called "Japanese barbarities," "ignorance of International Law," etc., etc., were, in this case, as in other cases, utterly without foundation. He may also be pardoned to hope that the *Kowshing* incident may serve in the future as a warning to that class of European adventurers who

have heretofore been in the habit of thinking that with the Orientals they may deal as they please simply because the guns of their nations will always protect them!

Tokichi Masao.

NOTE.—For lack of space the reports of the master and chief officer of the *Kowshing* and the nine official documents which passed between Japan and China, referred to in this thesis, have been omitted. Those who may wish to consult these will find them in the October Numbers of the *Japan Mail*, [Yokohama, 1894], and also in the Appendices of Vladimir's "Japan-China War."—*Ed.*

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NO ACT of the Fifty-fourth Congress during its first year's existence became it so well as its close. After its turbulent and com-motional lifetime the session terminated earlier than usual, and in a dead calm. All eyes and ears were turned in the direction of St. Louis, to the exclusion of all lesser centres of disturbance, and consequently the public in general hardly realized that both houses had closed their doors for the long vacation. There was, it is true, a brief sigh of relief in Wall street, but weightier matters burdened that financial quarter and interest in the end of the ses-sion died away immediately. It was odd to compare the curt newspaper notices of the bare fact this year with the picturesque and jubilant obituaries which followed the decease of the Fifty-third Congress. After the passing of that famous body the country at large breathed more freely and took heart for any lesser evils which the future might bring. But it is now an open question as to whether the Fifty-Fourth Congress has been a lesser evil than its predecessor. The past session has at least emphasized the fact that the public takes each year less and less interest in the doings of the House. Only occasionally during the emotional period of the jingo agitation, and again when the financial question looked really perilous, has the outside world bothered itself very much about what was going on in Washington. If the figures published are correct, this Congress has been an expensive one, having

spent some \$25,000,000 more than the Fifty-Third at its first session; and this has been done in opposition to the President's restraining veto, and in face of a weakened revenue. Probably to most persons this represents about the sum of what has been done during the year, and it certainly gives some ground for the notion of the philosophers that the problem of the next fifty years will be how to carry on a government without the burden of legislative bodies. An effort like that of the Senate in passing the Butler bill is enough to make business men hope that the philosopher's ideal may some day come true. As to any real work at law-making what little there is is done quietly and arouses no such public interest as always follows the work of every English parliament and constitutes the greatest strength of that body. But the session was at least a very short one and for this reason merited the President's congratulations on the early close of its labors. There was a delicious note of sarcasm in this verbal message of the Chief Executive which appeals strongly to everybody outside of politics.

* * *

It seems appropriate that in this, the last issue of the *LAW JOURNAL* for the present college year, the retiring board of editors express their thanks to the faculty and students of the school for their assistance and support. The *JOURNAL*, in spite of the fact that it is chiefly a legal organ, reflects in no small degree the life and growth of the Law Department. Neither does the board forget its obligation to the gentlemen of the Bench and Bar who have helped by contribution and criticism to maintain the high standard of former years in the present volume; it is in this coöperation of different classes of supporters that the success of a university publication must ultimately rest. The incoming board will be the first to carry on the *JOURNAL* under the three-year system, and it is to be hoped that the *JOURNAL* may gain by this extension in the length of the curriculum.

COMMENT.

The case of *Wong Wing et al. v. U. S.*, 16 Sup. Court Rep. 977, presents an interesting and important feature of the Chinese Exclusion Act, as construed by the Supreme Court on the following facts: Three Chinese persons, the appellants in this case, were brought before the commissioner of the U. S. Circuit Court for the district of Michigan upon a charge of being Chinese persons unlawfully within the United States, and not entitled to remain within the same, and, on proof of the charge against them, the commissioner directed that they be imprisoned at hard labor for sixty days, and that at the expiration of that time they be removed from the United States to China. On appeal from the Circuit Court, Mr. Justice Shiras delivered the opinion and based his decision upon the fourth section of the Chinese Act of 1892, which provides as follows: "Any Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States." The case turned upon the question of "due process of law," under the well-known provision in the Fourteenth Amendment. The Court held that the evident meaning of the above Act is that imprisonment at hard labor shall be undergone before the sentence of deportation is to be carried into effect; and that such imprisonment is to be adjudged against the accused by a justice, judge, or commissioner upon a summary proceeding; and it is upon this last statement that the court seems to base its decision, for it concludes by saying that when Congress sees fit to promote public policy by subjecting the persons of aliens to infamous punishment, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused, and in accordance with this opinion the judgment of the circuit court was reversed.

* * *

The law regarding foreign judgments is clearly stated in a recent decision of the Supreme Court of Connecticut in the opinion by Judge Baldwin in the case of *Fisher et al v. Fielding*, 34 Atl. Rep. 714. The defendant, a citizen of Connecticut, was served with process while transiently stopping at a hotel in Birmingham, England, and as he was about to take his departure for home. He failed to appear and judgment went against him by default in the English court. An action was brought on the

judgment in Connecticut, and the defendant set up a special plea to the jurisdiction of the foreign court. The Connecticut Supreme Court held that "the fact that the defendant was a foreigner, making but a brief stay in the country, and on the point of leaving it for his own, did not deprive the courts of England of all jurisdiction over him. He accepted the forum when he voluntarily placed himself on English soil, and so came under an implied obligation to respect such legal process as might be served upon him there, to the extent of satisfying any resulting judgment duly rendered for a pecuniary demand." And they also held that "no one who has been, or could have been, heard upon a disputed claim, in a cause to which he was duly made a party, pending before a competent judicial tribunal, having jurisdiction over him, proceeding in due course of justice, and not misled by the fraud of the other party, should be allowed after a final judgment has been pronounced, to renew the contest in another country." The question was also raised as to how far a foreign judgment for a sum of money, rendered against one of our citizens, should be held conclusive in a suit brought for its collection. The cases of *Aboulloff v. Oppenheimer*, 10 Q. B. Div. 295, 302, and *Vadala v. Lawes*, 25 Q. B. Div. 310, 316, 319, state the English rule to be that the defendant cannot go into the merits of the original cause of action, which were treated in the foreign court, unless it be necessary to support a claim that the judgment was obtained by fraud. In such a case, the merits may be retried, not to show that the foreign court came to a wrong conclusion, but that it was fraudulently misled into coming to a wrong conclusion, and if the triers are convinced that the foreign judgment should have been rendered, on the merits the other way, but still do not find that there was fraud, the defense fails. Following this doctrine, the Connecticut Court held that the judgment in suit was conclusive as to the merits of the cause of action, and should be enforced. The Supreme Court of the United States have recently held that the effect to be given to a foreign judgment in personam, for a money demand, must be determined either by the comity of nations, the rule of absolute reciprocity, or the personal obligation resting upon the defendant. Turning upon the question of reciprocity, in the case of *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, they decided that the judgment of a court of France was not conclusive in the United States. The Connecticut Supreme Court neither criticized nor approved the doctrine of *Hilton v. Guyot*, but held that "whichever test may be adopted, the result would be the same where the question arises between the courts of England and those of an American state which was once an English colony."

RECENT CASES.

Sales—Action on Contract—Defenses—Fraud.—*Fox v. Tabel*, 34 Atl. Rep. 101 (Conn.). In an action for breach of contract of sale, the plea that the plaintiff fraudulently represented himself as the agent of a third person in order to secure the execution of the contract, and that this third person had released the defendant from all liability is a good defense.

Notice—Record of Mortgage—Bona Fide Purchaser.—*Zear v. Boston Safe Deposit and Trust Co.*, 43 Pac. Rep. 977 (Kan.). When the registrar of Deeds wrongly recorded a mortgage of property as for \$100 instead of \$1,000, and the property was thereafter sold under a deed reciting the mortgage correctly and correctly recorded, and thereafter the property was again sold and the deed thereof incorrectly recited the mortgage as being for \$100; it was held that the purchaser under the last deed could not set up the fact that he was a bona fide purchaser in a suit by the mortgagee to foreclose the mortgage, he being charged with notice of the mistake in the second deed.

Carriers—Agency—Negligence in Sale of Ticket.—*Scott v. Cleveland C. C. & St. L. Ry. Co.*, 43 N. E. Rep. 133 (Ind.). A ticket agent for two different railroads negligently issuing a ticket over one when the application and payment were for a ticket over the other, as regards the applicant is the agent for the road to which the application was made and the road over which he issues the ticket and for which he is also agent, is not liable to the purchaser for the consequences of his negligence.

Gambling Contracts—Stocks Bought on Margins—Validity.—*Dillaway et al. v. Alden*, 33 Atl. Rep. 981 (Me.). Contracts for purchase and sale of stocks on margins are not illegal in case final balance is to be liquidated by actual delivery of remaining stocks.

Corporations—Banks—Stockholders' Liability.—Receivers.—*Wilson et al v. Book et al*, 43 Pac. Rep. 939 (Wash.). Where the constitution of a State declares that the stockholders of any banking corporation shall be personally and individually liable up to twice the amount of their stock, the liability of the stockholders is a secondary one, and cannot be enforced by the creditors, but

should be enforced by suit at the instance of the receivers, after disposing of all other assets of the insolvent bank.

Sunday Travel—Injury to Passenger—Liability of Carrier.—*Horton et ux. v. Norwalk Tramway Co.*, 33 Atl. Rep. 914 (Ct.). Plaintiff was injured while riding for pleasure on Sunday, and defendants claimed that only nominal damages could be recovered as the injury arose in the performance of an illegal contract, but the Court held that the general statutes of the State construed with the later public acts, did not prohibit Sunday travel to such an extent as to exempt carrier from liability for injury to passenger.

Eminent Domain—Measure of Damages for Street—Easement.—*In re* opening One Hundred and Sixteenth street, 37 N. Y. Sup. 508. On a question as to whether the correct principle was adopted in making award to property owners of a full value of land taken for street purposes subject to no easement public or private, it was held that the measure of damages to the owner of the fee for land taken for such purposes, which is subject to an easement, is its value subject to the easement.

Limitation of Actions—Personal Privilege.—*Lewis v. Buckley*, 19 Southern Reporter, 197 (Miss.). The appellant, while testifying in the court below, said, referring to the statute of limitations: "I never pleaded it in any case before and I do not plead it in this case." The court held that he had clearly withdrawn the defence; that no consideration was required for the withdrawal of a plea of this kind, and that the issue could not be further considered.

Insolvent National Bank—Distribution of Assets.—*Davis v. Elmira Sav. Bank*, 16 Supreme Court Rep. 502. By this decision the rule long adhered to in New York State giving banks a preference in the distribution of assets of an insolvent bank is held to be in conflict with the Federal Statute requiring the assets of an insolvent national bank to be distributed ratably among the creditors.

Notice—Indictment for Selling Intoxicating Liquor—Local Option Law.—*Lowery v. State*, 34 S. W. Rep. 956 (Tex.). Where a county passed local option laws, and a person was charged with selling liquor by an indictment which simply set up the fact that he had sold and given away liquor unlawfully, such indictment was held fatally defective, as the courts cannot notice judicially

the fact that the people of a county have passed a vote declaring local option.

Negligence—Liability of Owner of Falling Building.—*Steppe v. Alter et al.*, 19 South Rep. 147 (La.). The owner of a building damaged by fire is not excused from repairing it by the fact that the insurance company had elected to do so. As between himself and the public he owes the duty of keeping his premises in a safe condition and the law does not permit him to shift this responsibility to a third party.

Custom Duties—Instruments of Trade.—*United States v. Magnon*, 71 Fed. Rep. 293 (N. Y.). A snake charmer who brings snakes into this country purely for purposes of exhibition where she handles and turns them around her body is not obliged to pay duty under the provision, "All other live animals not specially provided for," but they are rather "instruments with which she practices her profession, and are her professional instruments," and hence free of duty under paragraph 686, Rev. Statutes.

Young Men's Christian Association—Liability for Negligence.—*Chapin v. Holyoke Y. M. C. A.*, 42 N. E. Rep. 1130. In this case, which was an action for damages resulting from the falling of a floor upon the plaintiff while she was at the laying of a corner stone to the Holyoke Y. M. C. A. building, the court held that the purposes of the Y. M. C. A. were social as well as charitable, since they provided theatrical and athletic entertainments for the peculiar benefit of their members, and hence were not exempted as purely charitable institutions are, from liability for negligence in construction of a floor whereby a visitor was injured.

BOOK NOTICES.

The Yale Shingle, 1896. William J. Tilson, Editor and Publisher. 112 pp.; cloth; price, \$1.00.

The Shingle for this year presents an unusually attractive appearance. The half-tone cuts are larger than heretofore, and the articles are of unusual interest. The various quotations inserted at the beginning of the histories is an innovation, and, on the whole, a success. *The Shingle* is to be complimented on the exceptionally fine cut of the Faculty which appears on page 52, and upon the taste displayed in the design of the cover.

Manual of Elementary Law. By William P. Fishback, Dean of the Indiana Law School, Indianapolis and Kansas City. The Bowen-Merrill Company, 1896. Pages xxvii., 467.

This book is an excellent work for all beginners in the study of law and for those who desire to acquire a knowledge of the fundamental principles of American law. Its simplicity of language and interesting style cannot fail to appeal to all such. Although there are numerous works on this same subject, yet, for clearness and brevity, it stands second to none. The broad and well-settled principles of the various branches of the law have been carefully stated and explained by the author and ample authority is given for the statements. No attempt is made to go beyond fundamental principles, hence the book would be of little use to the advanced student or practitioner, but for a beginner, it should prove an excellent work.

MAGAZINE NOTICES.

The Green Bag, June, 1896.

Daniel Webster,	Wm. C. Todd
The Law's Delays in Olden Times.	
Some Peculiar Judgments,	George H. Westley
Some Aspects of the Growth of Jewish Law,	David Werner Amram
The Doctrine of <i>Stare Decisis</i> ,	Boyd Winchester
The Lawyer's Position in Society,	Guy Carleton Lee
London Legal Letter.	
The Lawyer's Easy Chair,	Irving Browne

Harvard Law Review, June, 1896.

A Brief Survey of Equity Jurisdiction: VIII.,	C. C. Langdell
Improvement in Criminal Pleading,	Franklin G. Fessenden
Forbearance to Sue,	Edmund H. Bennett

American Law Review, May-June, 1896.

Status and Tendencies of the Dartmouth College Case,	Alfred Russell
The Supreme Court and its Constitutional Duty and Power,	Junius Parker
Old New England Lawyers,	Henry Childs Merwin
Power of Municipal Corporations to Regulate Telephone Charges, Control Streets, and Force Overhead Wires into Conduits,	Henry Clay McDougal
The Evils of Lobbying, and Proposed Remedy;	Samuel Maxwell
The Great Seal of England,	J. E. R. Stephens

The Central Law Journal, 1896.

May 15. Covenants in Lease,	James M. Kerr
May 22. Judicial Discretion in Divorce,	Percy Edwards
Liability for Defective Premises Resulting in Injuries to Children,	Seymour D. Thompson
Reforms in the Law of Newspaper Libel,	D. M. Mickey

SUPPLEMENT

CONTAINING

MEMORABILIA ET NOTABILIA.

The Wayland Prize Debate was held in College Street Hall on the evening of May 27th. The judges were Hon. Chauncey M. Depew, Rev. Dr. Geo. W. Douglas, Mr. A. C. Kendall. The subject for debate was, "Resolved, That United States senators should be elected by popular vote," and the men spoke in the following order: Edmund H. McVey, William L. Tibbs, Andrew M. Robinson, Herbert H. Kellogg, Andrew T. Bierkan, Ernest G. Smith, Frederick S. Martyn and Harry S. Burrowes. The first prize of \$50.00 was awarded to Kellogg, the second prize of \$30.00 to Smith, and the third prize of \$20.00 to Tibbs.

* * *

The announcement of the Townsend speakers was made June 6th. The men and their subjects are: John Loomer Hall, Yale, '94, of New Haven, on "Party Spirit in 1796 and 1896"; Frederick Sanford Martyn, Dartmouth, '94, of New Haven, on "The Mississippi Rule of Suffrage"; John Stephenson Pullman, Wesleyan, '92, of Bridgeport, on "The Mississippi Rule of Suffrage," and William Luther Tibbs, Colorado College, '94, of Salt Lake City, Utah, on "Party Spirit in 1796 and 1896."

* * *

At the last meeting of the Kent Club, held Monday, May 18th, the Club presented a silver-mounted, ebony gavel to Roger S. Baldwin, in recognition of his work in the Yale-Harvard Debate.

* * *

The following named men from the Class of '97 have been elected to conduct the JOURNAL for the following year: Avery, Gavin, Gibson, H. T. Halbert, Merwin, McGregor, Baldwin, and Beardsley.

SUPPLEMENT

CONTAINING

MEMORABILIA ET NOTABILIA.

Receptions were given October 3d, at Judge Baldwin's house, 44 Wall street, and October 10th, at the Law School building, in honor of Professor John Dove Wilson, Storrs lecturer for 1895.

* * *

The present Junior Class numbers one hundred and four, an increase of thirty over last year's entering class.

* * *

At a meeting of the Kent Club held Monday evening, October 7th, the following officers were elected for the Fall term: C. B. Waller, '96, President; Sladden, '97, Vice President; Avery, '97, Secretary; E. H. McVey, '96, Assistant Treasurer; C. A. Bierkan, '96, J. J. Hickey, '97, and Sladden, '97, Executive Committee.

* * *

Important changes in the faculty are the additions of Messrs. Bennett, Webb and Wurtz to the list of Senior instructors, and the loss of Professor Robinson.

* * *

Herbert James Wyckoff of the Senior Class has been appointed Registrar of the Law School, and Robert Scott Alexander Assistant Librarian.

* * *

1885. Edward Kinney, one of the popular men of the class of '85, has been elected Mayor of East Newark, N. J.

1893. Bamford A. Robb is practicing law in Boise City, Idaho, and has removed his office to the Pioneer Building.

William F. Foster has been appointed Instructor of Quiz Clubs of the Law School.

1894. George O. Redington is in the office of W. F. Carter, Brooklyn, N. Y.

Harrison B. Freeman has been appointed Assistant Prosecuting Attorney of the Hartford Police Court.

Solomon Isaac Levy is in the office of Judge Sylvester Barbour of Hartford, Conn.

1895. Dexter E. Tilley, who left at Christmas of his Senior year, is now in the office of Mayor Long, of Springfield, Mass., and was a delegate to the late State Republican Convention.

Albert H. Barclay, who has been travelling in Europe since graduation, arrived in New York, October 17th, on the steamer Amsterdam.

Frank J. Brown is in the office of Mathison & Averill of this city, and has recently been elected principal of the night schools.

John Wayland Peddie has returned from abroad.

Alfred C. Woolner is in an office in New York City.

Wendell G. Brownson is in the office of Chas. F. Knipe, Springfield, Mass.

Frank E. Donnelly is in an office in Syracuse, N. Y.

Ernest M. Long is practicing law in Richmond, Va.

Thomas H. Breeze is at 1330 Sutter street, San Francisco, California, and has not yet begun his legal work.

PRIZES AWARDED IN YALE LAW SCHOOL, JUNE, 1895.

Townsend Prize (\$100), Class of 1895—

HERBERT KNOX SMITH, B.A., Yale University, 1891.

Jewell Prize (\$50), Class of 1895—

HERBERT KNOX SMITH, B.A., Yale University, 1891.

Munson Prize (\$50), Class of 1895—

WILLIAM LLOYD KITCHELL, B.A., Yale University, 1892.

With *honorable mention* of William Henry Cox, Charles Vincent Henry and Henry A. L. Hall.

Betts Prize (\$50), Class of 1896—

EDWARD MARVIN DAY, B.A., Yale University, 1894.

Wayland Prizes (Yale Kent Club), Class of 1895—

First Prize (\$50), LOUIS CONNOR.

Second Prize (\$30), JOHN WAYLAND PEDDIE.

Third Prize (\$20), FRED. CLARK RECTOR, B.A., Ohio Wesleyan Univ. 1893.

Honors, Graduate Course.

Degree of M.L., *Magna cum laude*—

HENRY DEUTSCH, LL.B., University of Minnesota, 1894.

Degree of M.L., *Cum laude*—

WILLIAM FREDERICK FOSTER, LL.B., Yale University, 1894.

EDWARD JOSEPH MAHER, LL.B., Yale University, 1894.

Senior Class.

Degree of LL. B., *Magna cum laude*—

HERBERT KNOX SMITH, B.A.,
CHARLES VINCENT HENRY,
WILLIAM LLOYD KITCHELL, B.A.

Degree of LL. B., *Cum laude*—

ROBERT ADAIR,
THOMAS HAMILTON BREEZE, B.A.,
WILLIAM BARTHOLOMEW BROWN,
EDWARD MARTIN BURKE, B.A. Union University,
EDWARD LOUIS MEDLER,
CHARLES MILNOR WASHINGTON, B.A.,
ALFRED CHARLES WOOLNER, B.A.

Junior Class.

EDWARD MARVIN DAY, B.A.,
ROBERT SCOTT ALEXANDER,
RAYMOND HOLBROOK ARNOT, B.A.,
STEPHEN GARRETSON DOIG, B.A. Union University, 1892.
JOHN HILL MORGAN, B.A.,
JOHN STEPHENSON PULLMAN, B.A. Wesleyan University, 1892.
FREDERICK CLARK TAYLOR,
HERBERT JAMES WYCKOFF, B.A.

Special Course.

WINTHROP EDWARDS DWIGHT, B.A.

SUPPLEMENT

CONTAINING

MEMORABILIA ET NOTABILIA.

The Seniors have voted to wear caps and gowns at commencement and John Hill Morgan, '96; Andrew T. Bierkan, '96; Paul W. Harrison, '96, compose the committee elected to complete the arrangements.

* * *

Yale won the second annual joint Yale-Princeton debate held in Alexander Hall, Princeton, Friday evening, December 6th. The subject of the debate was: Resolved, That in all matters of State legislation of a general character, a system of referendum should be established, similar to that now established in Switzerland." Yale had the negative side and was represented by Edward H. McVey, '96 L. S.; Charles U. Clark, '97, and Austin Rice, T. S.

* * *

The *Hartford Courant* recently remarked: "The Yale Law School has already taken its assured place among the first schools of the sort in the country. The high character and marked ability of its instructors could not fail to draw there earnest young men who want the best training for the legal profession. This year the school has two hundred and twenty-two students against one hundred and ninety-five at the same time last year."

* * *

The Law School Class Book, the *Yale Shingle*, will be edited this year by William J. Tilson of the Senior Class, and will appear about May 1st.

* * *

1885. C. T. Watts has been appointed City Attorney of Toledo, Ohio.

1886. Frank D. Pavey was elected State Senator from the Fifteenth District of New York at the recent election.

1889. Professor George E. Beers was elected one of the Councilmen of the Ninth Ward of New Haven at the recent election.

1891. Stephen Brophy is practicing law in Toledo, Ohio.

1893. H. S. Cummings is one of the firm of Fessenden, Carter & Cummings, Stamford, Connecticut.

James R. Blake has announced his engagement to Miss Helen Putnam of New Haven, Connecticut.

James D. Dewell, Jr., was elected councilman of the Eighth Ward of New Haven at the late city election.

1894. William B. Bosley has recently been appointed instructor in the Hastings Law School, San Francisco, California.

William S. Haskell is in the office of Reeves, Todd & Hitchcock, 55 Liberty Street, New York City.

Howard A. Couse has an office in Cleveland, Ohio.

A. J. Balliet is practicing law in Seattle, Washington.

1895. W. Lloyd Kitchel is in the office of the law firm of Alexander & Green, New York City.

H. S. Bullard has just opened an office for the practice of law in Hartford, Connecticut.

C. V. Henry has opened an office at Anneville, Pennsylvania.

John Wayland Peddie has opened a law office at 160 Broadway, New York City.

Frank E. Donnelly, a former editor of the *JOURNAL*, was admitted to the bar in New York State last October. He has recently located in the office of John T. Lenahan, Wilkes-Barre, Pennsylvania.

Henry H. Ficken is practicing law in Charleston, South Carolina.

George L. King is a practicing lawyer of Meriden, Connecticut.

Albert H. Barclay will soon open an office in Pittsburgh, Pennsylvania.

Joseph S. Peery has been nominated by the Democratic Party for the Lower House of the Utah Legislature.

E. S. Banks is practicing law in Southport, Connecticut.

H. W. Hawley has begun the practice of law in Bridgeport, Connecticut.

David E. Fitzgerald has entered the law office of ex-Judge Lynde Harrison, of New Haven, Connecticut.

F. D. Keeler has begun the practice of law at Bridgeport, Connecticut.

SUPPLEMENT

CONTAINING

MEMORABILIA ET NOTABILIA.

Rev. J. M. Buckley, D.D., of New York City, delivered the opening lecture of the Kent Club series, at the College Street Church, Thursday, January 16, at 8 P. M. His subject was "The Assassination of Kings and Presidents."

* * *

Philip P. Wells, '89, has been appointed Librarian of the Law School Library. He succeeds William Trumbull, '83, whose resignation took effect February 1.

* * *

At a meeting of the Senior class held Monday, January 20th, William J. Tilson, '96, and William H. Kreider, '96, were appointed as a committee to make necessary arrangements in regard to class pictures.

* * *

A meeting of those interested in the baseball prospects of the Law School was held in the smoking room Monday afternoon, February 10th, and the following officers were elected: S. C. Sladden, '97, president; W. B. Cruttenden, '96, treasurer; W. F. Alcorn, '97, secretary; E. J. Woolsey, '96, scorer, and W. C. Atkins, '96, temporary captain.

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At a meeting of the Kent Club, held Monday evening, January 13th, Edward H. McVey, '96, was elected president; C. L. Avery, '97, vice-president, and W. H. Manchester, '96, treasurer.

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The Seniors have taken up Clark's Criminal Procedure under Mr. Webb, Code Pleading under Judge Prentice and Equity under Hon. E. J. Phelps, this term.

* * *

Examinations for conditioned men and all *omitted* examinations in the Law School were held Saturday, February 15th, at 2.15 P. M.

At a meeting of the Wayland Debating Club held Wednesday afternoon, January 15th, Henry Waterman, '97, was elected president; George B. Thayer, '97, secretary; Sidney C. Sladden, '97, critic; Charles F. Peterson, '97, and N. Candee, '97, executive committee.

* * *

1845. Daniel B. Beach died suddenly at Rochester, N. Y., on Sunday, January 5th. He was admitted to the bar of Connecticut in August, 1845, and to the New York bar at Albany in 1847. He represented the Seventh Ward in the Board of Supervisors for two terms, and was also a member of the Rochester Bar Association.

1864. James Betts Metcalf, a member of the Board of Governors of the New York Stock Exchange, senior member of the firm of James B. Metcalf & Co., bankers and brokers at 8 Broad Street, New York City, died at his home Saturday, February 1st. He was graduated at Williams College and then entered the Yale Law School, class of 1864.

1867. Wilfred E. Norton, of the firm of Treat & Norton, of Bridgeport, Conn., died in that city Monday, January 6th. He graduated in the Academic Department in the class of '64, and for a year or two after taught in the Norwich Free Academy. He then entered the Law School, graduated and was admitted to the bar in 1867.

1877. A. M. Talmadge, '77; George E. Hill, '91, and William T. Hincks, '93, composed the committee of arrangements of the Fairfield Alumni Association dinner held at Bridgeport, Conn., December 12th. Presidents Dwight and Low, Hon. William B. Hornblower, General Wager Swaine, Judge David B. Lockwood and Hon. W. D. Bishop were among the speakers of the occasion.

1879. Hon. John B. Douglas, of the firm of Lynch & Douglas, died suddenly at his home in Bridgeport, Conn., Saturday, December 14th. He graduated from the Yale Law School in the class of '79, and began to practice law in Hartford, Conn., but owing to poor health he was obliged to go out West, and settled in Duluth, Minn. He returned East about two years ago and located at Bridgeport.

1890. Nathaniel W. Bishop has entered the law firm of Bristol, Stoddard & Bristol, New Haven, Conn.

John W. Keerans of Charlotte, N. C., is a member of the firm of Osborne, Maxwell & Keerans.

1893. Wallace S. Moyle has been engaged to coach the Brown football team again this fall.

Daniel F. Fowler is practicing law at Oneonta, N. Y.

George H. Huddy, Jr., has opened an office for the practice of law at 48 Weybosset Street, Providence, R. I.

1895. Wendell G. Brownson, a former editor of the JOURNAL, has opened an office at 425 Main Street, Springfield, Mass.

Ben A. Younker and William B. Brown have formed a partnership and have offices at 511 Walnut Street, Des Moines, Iowa.

John H. Wigginton is in a law office in New York City.

Benedict M. Holden is practicing law in Bristol, Conn.

William Hungerford is in the office of his father at Hartford, Conn.

Allyn B. Wilmot has an office in the new bank building, corner Church and Crown Streets, New Haven, Conn.

Spencer L. Adams, a former editor of the JOURNAL is practicing law at Skaneateles, N. Y.

Terrence F. Carmody is practicing law in Waterbury, Conn.

David E. Fitzgerald is in the office of ex-Congressman Pigott, New Haven, Conn.

Edward L. Seery has opened an office at Waterbury, Conn.

Thomas F. Carroll is in the Senior Class in the Academic Department.

Edward H. Tracy is in the office of McMahon & McMahon, 8 Fireman's Insurance Building, Dayton, Ohio.

SUPPLEMENT

CONTAINING

MEMORABILIA ET NOTABILIA.

The Wayland Debating Club held its first banquet Saturday, March 7th, at the Hotel Majestic. This was in partial celebration of the club's recent victory over the Kent Club in debating. Dean Francis Wayland and Prof. John Wurtz were the guests of honor. Henry Waterman, '97, acted as toastmaster.

* * *

A meeting of the Baldwin Debating Club was held in Room 24, Law School, Thursday, March 13th, and the following officers were elected to serve six weeks: President, C. A. Mears; Vice-President, Hugh T. Halbert; Recording Secretary, E. S. Buckingham; Corresponding Secretary, F. W. Minor; Treasurer, G. H. Barlow; Critic, F. E. Newberry; Curators, M. A. Kilker and M. Gavin, 2d. Judge Baldwin was elected an honorary member.

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The Wurtz Debating Club was organized February 20th and named in honor of Prof. Wurtz, who was elected President *ex-officio*. The following officers were elected: President, Roger S. Baldwin; Secretary, C. M. Smith; Executive Committee, W. F. Alcorn and G. H. Barlow. The membership is limited to twelve.

* * *

A reception was given to the students of the School in the Library Room on Tuesday evening, March 17th, from 8 to 10. Members of the faculty, graduate students and seniors wore gowns. Light refreshments were served, and the evening passed pleasantly. The following men acted as ushers: From '96, W. E. Dwight, E. H. McVey, H. H. Kellogg and E. G. Smith; from '97, R. S. Baldwin, M. Gavin, 2d, and J. W. Thompson.

* * *

Candidates for the Law School Baseball Team have been practicing in the cage since February 22nd and a final selection of the team was made Saturday, March 14th. H. S. Burrowes, '96, was elected permanent captain and the following men were measured for suits: Catchers, Burrowes, '96, and Macdonald,

'96; pitchers, Holston, '96, and Buckingham, '97; Smith, '96, 1st base; Beers, '97, 2nd base; McKell, '97, 3rd base; Martin, '97, short stop; outfielders, Buzzell, '97, Sanford, '96, Mederos, '97; Moore, '97, substitute. Suits were ordered from A. G. Spalding & Bros., and the sweaters have L. Y. S. in six-inch letters; the shirts have YALE L. S., all letters the same size. Manager Sladden has arranged an extended Southern trip for the Easter vacation, having games scheduled at Washington, Philadelphia, Pittsburg, Baltimore and Fordham. Dean Wayland and all the faculty have been liberal in their donations for the support of the team.

* * *

The following seniors have been chosen from the Kent Club to speak for the Wayland Prizes; Bierkan, Burrowes, Kellogg, Martyn, McVey, Robinson, Smith and Tibbs. The committee of five juniors chosen to select them consisted of the following men: Baldwin, Merwin, Feely, Gavin and Peterson.

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A Quiz Club in Real Property has been formed by members of the Senior class, of which Brooks, '96, has been elected president.

* * *

The faculty have decided to add two new courses to the curriculum next year. One is New York practice and Procedure and the other is Connecticut Practice and Procedure.

* * *

'49. Hon. Willis R. Austin died at his home in Norwich, Conn., on March 4th, of pneumonia, after an illness of four days. He was born in Norwich, January 31, 1819, and graduated from the Yale Law School in 1849. For many years he was engaged in cotton speculation in Texas and afterwards was a banker in Philadelphia. After a number of years of European travel Mr. Austin returned to Norwich to reside. In 1874 he was elected a member of the Legislature. Two years later he was elected State Senator, serving one term. Mr. Austin was President of the Norwich Club, a Vice-President of the Dime Savings Bank, and a Director of the Second National Bank in that city.

'66. At the recent election of officers in the Storrs Agricultural College, Ex-Congressman William E. Simonds was chosen Vice-President.

'84. John E. Wurtz, instructor in Elementary Law and Real Property, was made assistant professor at the recent corporation meeting.

'94. G. F. Gouraud is the New York representative of the International Law Agency, which has been established recently in Hanover, Germany.

Jesse W. Crain has opened an office in the Toney Building, Erwin, Tennessee, and has recently been appointed Back Tax Attorney for Unicoi County, Tennessee.

George P. Hawkes has offices in the Mills Building, 35 Wall Street, New York City.

Herbert W. Hamlin has opened an office at 1015-100 Washington street, Chicago, Ill.

John C. Clark was married to Miss Jean Pardee of New Haven, Conn., on January 2d.

'95. Fred'k L. Averill and Paul W. Harrison were admitted to the Connecticut bar at the winter examination in Hartford.

George P. Ahern has gone to Montana to resume his position as 1st lieutenant in the United States Army.

Ex-'96. Joseph E. Morgan has left New Haven to go into the electrical business with his brother in Topeka, Kansas.

SUPPLEMENT

CONTAINING

MEMORABILIA ET NOTABILIA.

The Wayland Debating Club held its first meeting of the term on Thursday April 10th and the following officers were elected: President, N. Candee; Secretary, A. A. Wilder; Critic, H. L. Waterman; Executive Committee, H. E. Merwin, J. W. Thompson.

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1852. Curtis S. Bushnell, a well-known lawyer of Fair Haven, Conn., died on March 23, 1896. He was born in Westbrook, Conn., on November 15, 1825. He studied law with Hon. Samuel Ingham, and in the Yale Law School from which he was graduated in 1852. Admitted to the bar in 1853, he has since practiced law in New Haven and Fair Haven. In August, 1858, Mr. Bushnell was married to Miss Margaret A. Clark who, with one son, survives him.

1873. Charles F. Bollman, of New Haven, sent to Governor Coffin on April 11, his resignation as director of the Connecticut State Prison. Mr. Bollman was appointed to this position by Governor Morris about three years ago.

1888. Charles H. Peck was elected Judge of the Probate Court of Stratford, Conn., on April 22d, 1896.

1892. Samuel A. York, Jr., has removed his law office to Rooms 5 and 6, 157 Church street, New Haven.

1894. The marriage of Miss Grace Wheeler of New Haven and William Lloyd Kitchel, '95 L. S., took place in St. Thomas' Church on Thursday afternoon, April 16.

1894. George E. Hall has formed a partnership with W. H. Chapman of New Haven for the practice of patent law. They have opened an office in the Exchange Building.

1895. W. F. Thetford is practicing law at Columbiana, Ala.

The Kent Club elected as officers for the Spring term: Kellogg, '96, President; Hatcher, '97, Vice-President; Higgins, '97, Secretary; Tibbs, '96, critic; Executive committee, Martyn, '96, Hatcher, '97, and Merwin, '97.

Lars A. Whitcomb is now practicing law at Nos. 29 and 31 Thorpe Block, Indianapolis, Ind.



